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**Legitimate Expectations in Investment Treaty Arbitration**

**Balancing between State's Legitimate Regulatory Functions and Investor's Legitimate Expectations**

Muhammad, Nasiruddeen

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**Legitimate Expectations in Investment Treaty Arbitration:  
Balancing between State's Legitimate Regulatory Functions and  
Investor's Legitimate Expectations**

**Nasiruddeen Muhammad**

Student ID Number:

**060014911**

Thesis submitted in fulfilment of the requirements for the award of degree of  
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**Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP),  
University of Dundee, Scotland**

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## **ABSTRACT**

One of the impacts of globalization on the nation states across the globe is how the system reduces governmental intervention and weakens governmental control over many activities within a state's territory. From the governance perspective, states regulate and administer affairs within their territories in accordance with their constitutional mandates of satisfying fundamental objectives of their needs; the extent to which states can satisfy those needs is critically dependent on their ability to pursue public interest oriented policies for meeting the basic needs and for further development of its citizens i.e. for the public good. However, as the tasks of states entail regulation and administration for public purpose, it carries the risk of infringement of private interest or unfair treatment against private entities operating within the state. The complex nature of the investor - state relationship, therefore, provides a lush ground for tension and conflict between public and private interests. Private interests in this context, are the state's commitments to the foreign investors covered by investment treaty jurisprudence, while public interests are the domestic needs regarding public good also linked to compliance with other non-investment albeit international obligations.

Under various domestic legal orders and some international law regimes, there is a well-developed principle of legitimate expectations which allows courts and domestic tribunals to filter, both, the legitimacy of individual's expectations and public interest dimension of governmental activities. In investment treaty arbitration, however, this tool or mechanism is lacking. The practice of the investment treaty (ad hoc) tribunals reveals the worrying degree of inconsistency and lack of coherence in the analysis of formulation and application of the principle of legitimate expectations. The principle as applied by investment treaty tribunals can be understood as "reliance by foreign investor" caused by "a state through its representation, conduct, or established legal framework", pursuant to which the foreign investor suffers

damage or loss emanating from the state's regulatory or administrative measure. While Claimants in investment treaty arbitration are increasingly relying on the principle to frame their claims, its contours remain unsettled. In addition to the varying degrees of ambiguity in the formulation of the principle, the reach of its application raises the tension of overlap with a public interest dimension of the state's regulatory and administrative functions, particularly in the areas of human rights, public health, environment, and necessity measures or public choice.

This thesis uses the doctrine of 'margin of appreciation' as an analytical framework for a comparative approach methodology. The doctrine of margin of appreciation as a public law tool could serve as a lens through which investment treaty tribunals could both formulate and apply the principle of legitimate expectations without obscuring the regulatory and administrative functions of states.

## **DECLARATION**

I, Nasiruddeen Muhammad, do hereby declare that I am the author of this thesis; that I have personally consulted all the references cited, unless otherwise stated; that the work, of which this thesis is a record, has been done by me, and it has not been previously accepted for a higher degree.

31<sup>st</sup> March 2015



# Chapter I: Legitimate Expectations in Investment Treaty Arbitration: The Quest for Balancing

## 1.0 Background

The impact of globalisation on states and the emergence of international law rules have diluted the concept of state sovereignty from absolute control by states over activities within their territory to an international scrutiny through the instrumentality of international regulations.<sup>1</sup> This impact reduces governmental intervention and weakens governmental control over activities within territories of states.<sup>2</sup> One of the factors responsible for this changing nature in domestic administration is the expansion of economic activities from purely domestic boundaries regulated by domestic laws to transnational coverage. From the governance perspective, states regulate and administer affairs within their territories in accordance with their constitutional mandates of satisfying fundamental objectives of their needs; the extent to which states can satisfy those needs depends largely on their ability to pursue

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<sup>1</sup> Jack Goldsmith, 'Sovereignty, International Relations Theory, and International Law' (1999) 52 Stanford Law Review 959 For a contrary view see; Duncan Hollis, 'Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty' (2002) 25 Boston College International and Comparative Law Review 235 In *SS Wimbledon* the PCIJ appear to endorse the contrary view. According to the Court: '...The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any Convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.' See; *SS Wimbledon (Merits)* [1923] Ser No 1 (PCIJ) 25.

<sup>2</sup> Oscar Schachter, 'The Erosion of State Authority And Its Implications For Equitable Development', *International Economic Law With a Human Face* (Martinus Nijhoff Publishers 1998) 31; On the impact of globalization on states see: Peter Malanczuk, 'Globalization And The Future Role of Sovereign States', *International Economic Law With a Human Face* (Martinus Nijhoff Publishers 1998) 45-65.

public interest oriented policies for the successful delivery of the common good to their citizens. However, as the task of governance entails administration for public purpose, there is a risk of infringement of private interest or unfair treatment against private entities by states. The complex nature of an investor - state relationship further provides a lush ground for a flame of conflicts between public and private interest. Private interests in the context of International Investment Law connotes the interest of the foreign investors as covered by investment treaties, while public interests are domestic or host state interests most often, tailored towards discharging public goods<sup>3</sup> or compliance with other non-investment<sup>4</sup> albeit international obligations.<sup>5</sup> Thus, the need to strike a fair balance between public and private

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<sup>3</sup> On the relevance of public goods in the context of investment arbitration see: Francesco Francioni, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20 *European Journal of International Law* 729 See also; Graham Mayeda, 'International Investment Agreements between Developed and Developing Countries: Dancing with the Devil - Case Comment on the Vivendi Sempra and Enron Awards' (2008) 4 *McGill International Journal of Sustainable Development Law and Policy* 189, 189.

<sup>4</sup> Areas seemingly conflicting or raising tension with investment treaty regime includes environmental regulations, human rights, public health regulations and tax regulations. On the environmental dimension see; Thomas Waelde and Abba Kolo, 'Environmental Regulation, Investment Protection and "Regulatory Taking" in International Law' (2001) 50 *International & Comparative Law Quarterly* 811 On Human rights interaction see;; On human rights interaction see; Moshe Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009)

<<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199578184.001.0001/acprof-9780199578184-chapter-5>> accessed 8 December 2014; On public health interaction Valentina Sara Vadi, 'Reconciling Public Health and Investor Rights: The Case of Tobacco' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) <<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199578184.001.0001/acprof-9780199578184-chapter-19>> accessed 8 December 2014; On tax regulation see; Abba Kolo, 'Tax Veto as a Special Jurisdictional and Substantive Issue in Investor-State Arbitration: Need for Reassessment' (2008) 32 *Suffolk Transnational Law Review* 475.

<sup>5</sup> Moshe Hirsch, 'Interactions between Investment and Non-Investment Obligations in International Investment Law' (Social Science Research Network 2006) SSRN Scholarly Paper ID 947430 <<http://papers.ssrn.com/abstract=947430>> accessed 8 December 2014.

interest becomes pertinent. One way of striking such a balance by courts and tribunals is by applying the principle of legitimate expectations.

Under various domestic legal orders, there is a well-developed principle of legitimate expectations, which allows the courts and domestic tribunals to supervise, filter and control governmental activities.<sup>6</sup> The principle is situated mainly in the domain of administrative law,<sup>7</sup> through the instrumentality of 'reciprocal trust between citizens and their authorities'.<sup>8</sup> Hence, this relationship between an individual and state transforms into a protected legal obligation. The content of this protection under domestic law entails that an individual is entitled to reasonably rely on the state of affairs created by public bodies. Individuals are not to be taken unawares through administrative or public actions or conducts. Similarly, official or public representations or conduct may legally generate individual's expectations regarding the position of affairs thereby becoming a basis for reliance. The scope of the principle, though it varies from one jurisdiction to another, is well documented in European administrative law.<sup>9</sup> Similarly, the principle is

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<sup>6</sup> Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (Hart Publishing 2000) 1.

<sup>7</sup> Prof A Bradley and Prof K Ewing, *Constitutional and Administrative Law* (15 edition, Longman 2010) 753; See also Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (OUP Oxford 2008) 234; See also *International Thunderbird Gaming Corporation v United Mexican States* (NAFTA 'Uncitral') [paras 25–29] Walde traces the origin of legitimate expectations under the 'good faith principle of treaty interpretation', Administrative law, Comparative Contract Law, and International Economic Law, particularly WTO Jurisprudence. .

<sup>8</sup> Daphne Barak-Erez, 'The Doctrine of Legitimate Expectations and the Distinction between the Reliance and Expectation Interests' (2005) 11 *European Public Law* 583, 6.

<sup>9</sup> For a comparative study of common law and civil law origins see; Thomas (n 6); See also; Soren Schønberg, *Legitimate Expectations in Administrative Law* (OUP Oxford 2000); The origin of legitimate expectations under english law is linked to the 'principle of Wednesbury

closely related with the private law principle of estoppel under English law which connotes that in business and commercial transactions private entities can hold each other to their representations provided there is reasonable reliance.<sup>10</sup> Thus, the idea of predictability, coherence and certainty are clearly at the heart of the shared conceptions of both public and private law dimensions of legitimate expectations. Legal certainty as a principle of law implies that, while placing their reliance on administrative representations or conduct, private persons should be able to plan their routine activities,<sup>11</sup> and Law should thwart against disruption of such plans except where there are compelling legitimate reasons.

However, under International Law, the grounding of the principle of legitimate expectations is not solid and coherently formulated and applied like domestic legal systems. Perhaps, the principle has been invoked and endorsed by PCIJ, ICJ, WTO<sup>12</sup>, ECJ, ECtHR and Investment Treaty Tribunals. Indeed, the transnational nature of the relationship between foreign investors and host countries makes the conception of investor's legitimate expectations

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reasobaleness' See *Associated Provincial Picture Houses V Wednesbury Corporation* (1948) 1 KB 223; Lord further expatiated on 'Wednesbury principle'. See; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; For a detailed discussion on the administrative law origin of the principle, see; SAD Smith, *Judicial Review of Administrative Action* (5th Revised edition, Sweet & Maxwell 1995) 611–650.

<sup>10</sup> Under English law, abuse of power being the outcome of violation both public law legitimate expectations and private law estoppel has been identified as the common feature shared by both principles. As held by House of Lords per Lord Hoffman: 'There is of course an analogy between a private law estoppel and the public law concepts of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power...' See: *R (Reprotech (pebsham) Ltd) v East Sussex County Council* (2003) 1 WLR 348 [para 34].

<sup>11</sup> Schønberg (n 9) 68.

<sup>12</sup> Marion Panizzon, 'Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation, and Fair Dispute Settlement' (Hart ; Schultsess 2006).

a key factor. This is particularly so for determining less clear standards of treatment that ought to be accorded to foreign investors pursuant to international investment treaties.

Historically, there were attempts by states to produce a global treaty regulating International Investment Law.<sup>13</sup> Due to the complex nature of investor-state relationship, the multilateral efforts proved abortive and states resorted to bilateral investment treaties which currently regulate transnational investments.<sup>14</sup> Bilateral investment treaties are species of the international ordering structure regulating investment. Most investment treaties provide for the obligation of state parties to treat foreign investors and their investments fairly and equitably. The scope of fair and equitable treatment has been interpreted to substantially, include the protection of legitimate expectations of the foreign investor.<sup>15</sup> Both the treatment and the interpretation of legitimate expectations remain vague and unclear.<sup>16</sup> Although, investment treaty tribunals are constantly invoking the principle, it is yet not clear when governmental actions and conduct can be said to have galvanised investor's legitimate expectations, and when same expectations can be said to have been breached by the state. Moreover, the term legitimate

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<sup>13</sup> M Sornarajah, *The International Law on Foreign Investment* (3 edition, Cambridge University Press 2010) 257–275.

<sup>14</sup> Sornarajah (n 13).

<sup>15</sup> *Saluka Investments BV (The Netherlands) v The Czech Republic Partial Award* (Watts, Fortier, Behrens) (PCA (UNCITRAL)) [302].

<sup>16</sup> Sornarajah (n 13) 354–357; Peter D Cameron, *International Energy Investment Law: The Pursuit of Stability* (OUP Oxford 2010) 171; For detailed criticism, see; Abhijit PG Pandya and Andy Moody, 'Legitimate Expectations in Investment Treaty Arbitration: An Unclear Future' (2010) 15 *Tilburg Law Review* 93; Trevor Zeyl, 'Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law' (2011) 49 *Alberta Law Review* 203.

expectations is neither mentioned nor defined in most of the bilateral investment treaties. Therefore, the reference to legitimate expectation in investment treaty text is a recent practice, mostly contained in the United States 2004 model BITs and Canadian model BITs.<sup>17</sup> Therefore, the interpretation and its content are left at the hands of investment treaty tribunals.

In broader terms, legitimate expectations under public international law refer to reliance of states on each other pursuant to a previous assurance or behaviour of another state.<sup>18</sup> In the European community law perspective, it refers to predictable treatment in the application of law by government upon which an economic agent relies.<sup>19</sup> In investment treaty arbitration, flowing from the above perspectives, the principle can be understood as reliance by foreign investor, caused by a state through actual representation, conduct or established legal framework, pursuant to which the foreign investor suffers damage or loss emanating from a negative measure by the state. In practical terms, two scenarios are envisaged namely, assurance scenario and legal framework scenario. Assurance scenario takes the form of a specific representation or conduct by the state, like state's unilateral undertakings to

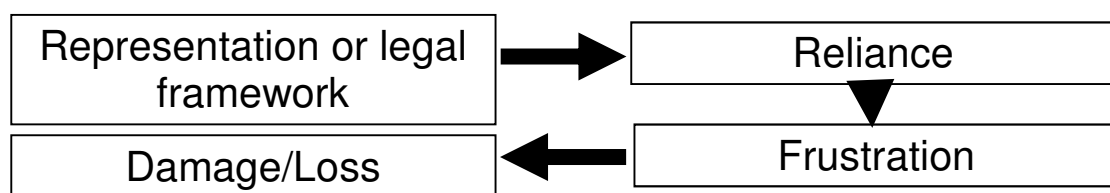
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<sup>17</sup> The United States Model BITs and Canadian Model BITs explicitly provides for 'investment-backed expectations' in the context of expropriation. See: Annex B of US Model BIT 2004, and Annex B 13 (1) of Canadian Model BIT. For criticism of US Model BITs See; Stephen M Schwabel, 'The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law', *Justice in International Law* (Cambridge University Press 2011) <<http://dx.doi.org/10.1017/CBO9780511793912.014>>.

<sup>18</sup> Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press 1999) 107.

<sup>19</sup> Eleanor Sharpston, 'Legitimate Expectations and Economic Reality' (1990) 15 *European Law Review* 103, 2.

the foreign investor,<sup>20</sup> while legal framework scenario could emanate from overall legal and regulatory framework set up by the host state at the time the foreign investor is making its investment.<sup>21</sup> The sources of legitimate expectations include investment treaties, state laws and regulations, policies, contracts, official communications, behaviour of the state or its regulatory organs. The following illustrates the chain of legitimate expectations.



There are two conflicting views between foreign investors and host states surrounding arbitrating legitimate expectations. From the foreign investor's perspective, states are bound to honour their treaty obligations, uphold the principle of sanctity of agreements under international law and fulfil investment backed expectations.<sup>22</sup> From the host states perspective, investors

<sup>20</sup> W Michael Reisman and Mahnoush H Arsanjani, 'The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes' (2004) 19 ICSID Review 328, 328.

<sup>21</sup> Andrew Newcombe, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 279-289; Peter D Cameron, 'Stability of Contract in the International Energy Industry' (2009) 27 Journal of Energy and Natural Resources Law 305, 326; Schreuer C. and Kriebaum U, 'At What Time Must Legitimate Expectation Exist?', *A liber amicorum: Thomas Wälde: law beyond conventional thought* (Cameron May 2009).

<sup>22</sup> This view represents Claimants arguments in all arbitrations where legitimate expectations is sought to be arbitrated. The legal ground in support of claimant's perspective is the provision of fair and equitable treatment which includes investor's legitimate expectations under the relevant BIT, and the law of the host state pursuant to which the claimant acquires legal right. See for instance; *Glamis Gold v USA* (NAFTA 'UNCITRAL RULES') [paras 561-565]; For a wider perspective of foreign investor's approach see; Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2008) 136-143.

must conduct their due diligence, particularly when socio-economic activities are inherently ever-changing, thus, regulatory and policy changes are inevitable in domestic public administration.<sup>23</sup> The two divergent views represent the input that goes to investment treaty tribunals. The output is what gives birth to the research problem.

## 1.1 Research Problem

Two essential problems have been identified as follows:

- a. Uncertainty in the formulation of legitimate expectations by the investment treaty tribunals.
- b. Lack of clarity in the application of legitimate expectations in investment treaty arbitration arising from overlap between investor's legitimate expectations and state's legitimate regulatory function.

Apart from the obligation to treat foreign investors fairly and equitably contained in most investment treaties, a step further towards fulfilling investor's expectations is blurred with unclear formulations and inconsistent applications. Should the expectations test be subjective or objective? While protection of legitimate expectations is desirable should the interpretative emphasis be on the investor's belief or on an autonomous test. More

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<sup>23</sup> This view represents Respondents positions in most of the arbitrations. The backing for the Respondents perspective, apart from disputing the existence of the obligation to fulfill investor's legitimate expectations totally, takes the form of relying on the treaty exceptions provided for in the treaties. See *Saluka Investments BV (The Netherlands) v The Czech Republic Partial Award (Watts, Fortier, Behrens)* (n 15) [para 255]; *Parkerings-Compagniet AS v Republic of Lithuania ICSID Case No ARB/05/8* (ICSID) [para 303]; For a detailed host states perspective, see; Vicente Yu and Fiona Marshal, 'Investors' Obligations and Host State Policy Space' (International Institute for Sustainable Development (IISD) 2008).



debatable recently, is whether regulatory framework should form part of foreign investor's legitimate expectations. There are no clear-cut answers to these questions. The outcome of the investment treaty tribunals' analysis of legitimate expectations further added to the uncertainty and lack of clarity in the jurisprudence. The uncertainty regarding the formulation of investor's legitimate expectations and lack of clarity in the application have been identified as the two key problems surrounding the investment treaty jurisprudence of legitimate expectations. Regarding the first problem of uncertainty of formulation of legitimate expectations, the tribunals have swayed between broad and narrow approaches. While some tribunals formulated the principle in a broader way, some tribunals formulated it in a narrower way. For example, in **Tecmed v Mexico** the tribunal undoubtedly formulated the principle in a broader way that:

*'The foreign investor expects the host state to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments...'*<sup>24</sup>

A much narrower approach was however adopted in **Saluka v Czech Republic**. In the words of the tribunal:

*"...No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was*

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<sup>24</sup> *Técnicas Medioambientales Tecmed, SA v The United Mexican States ICSID Case No ARB (AF)/00/2 (ICSID)* [154] After Tecmed award many arbitral tribunals adopted directly or indirectly the tecmed broader notion of protection of investor's legitimate expectations. See for instance; *CMS v Argentina ICSID Case No ARB/01/8*; *LG & E v Argentina ICSID Case No ARB/02/1*.

*justified and reasonable, the host state's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well...*"<sup>25</sup>

Of recent, the coverage of investor's legitimate expectations to include predictable legal framework was completely rejected by **Continental Casualty v Argentina**.<sup>26</sup> In the tribunal's view, even where there is promise as to stability by the host state, it would be unconscionable to expect the host state not to change the legal framework in cases of need.<sup>27</sup>

Secondly, the problem of incoherence in the application of legitimate expectations is clearly manifest in the arbitral awards due to the absence of systematic approach in applying the principle. For instance, In **International Thunderbird Gaming Corporation V United Mexican States**<sup>28</sup> while the tribunal was unanimous on the recognition of principle of legitimate expectations as part of fair and equitable treatment standard, they could not unanimously agree on its application to the case. In the wordings of the tribunal:

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<sup>25</sup> *Saluka Investments BV (The Netherlands) v The Czech Republic Partial Award* (Watts, Fortier, Behrens) (n 15) [305]; The tribunal in *Methanex* while rejecting Claimant's case asserts that knowledge of instability in a sector or economy could disentitle the foreign investor from alleging violation of legitimate expectations pursuant to stable framework. See *Methanex Corporation v USA* (NAFTA 'UNCITRAL 1976') Part iv Ch. D p. 5; Other tribunals that adopted narrower conception of legitimate expectations includes; *Glamis Gold v USA* (n 22); *PSEG Global Inc & Anor v Republic of Turkey ICSID Case NoARB/02/5* (ICSID); *Parkerings-Companiet AS v Republic of Lithuania ICSID Case No.ARB/05/8* (n 23).

<sup>26</sup> *Continental Casualty v Argentina Case NoARB/03/9* (ICSID).

<sup>27</sup> *Ibid* para 258; See also *Glamis Gold v USA* (n 22) [620] Where the tribunal stresses on the specificity of an assurance or commitment before it can be accepted as capable of inducing expectations.

<sup>28</sup> *International Thunderbird Gaming Corporation v United Mexican States Mexico* (NAFTA 'Uncitral').

*'The threshold for legitimate expectations may vary depending on the nature of the violation alleged under the Nafta and the circumstances of the case. Whatever standard is applied in the present case however-be it broadest or the narrowest – the tribunal does not find that the officio generated a legitimate expectation upon which EDM could reasonably rely in operating its machines in Mexico.'*<sup>29</sup>

The above reasoning led to separate opinion of Professor Thomas Walde. In his separate opinion while highlighting the differences with the majority view stated thus:

*"...They imply a very high level of due diligence, of knowledge of local conditions and government risk to be taken by the investor. I rather see the government as responsible for the message conveyed: i.e. how such conduct was reasonably understood by the investor..."*<sup>30</sup>

Therefore, the cumulative effect of general inconsistency and lack of clarity in the overall investment treaty regime attracts criticism of many awards particularly the Argentinean<sup>31</sup> cases for lack coherent reasoning and contradictory findings. For the purpose of this research, the two problems identified represent the output of the two conflicting arguments between foreign investors and host states in investment treaty tribunals. The problem further illustrates the current state of the jurisprudence under investment treaty tribunals. From a practical viewpoint, inconsistent and unpredictable

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<sup>29</sup> Ibid 148.

<sup>30</sup> *International Thunderbird Gaming Corporation v. United Mexican States* (n 7) [para 6].

<sup>31</sup> Luke Eric Peterson, 'Argentine Crisis Arbitration Awards Pile Up, but Investors Still Wait for a Payout' <<http://justinvestment.org/2009/07/argentine-crisis-arbitration-awards-pile-up-but-investors-still-wait-for-a-payout/>>; For a detailed analysis of the Argentinian cases, see; Jose Alvarez and Kathryn Khamsi, 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime', *Yearbook on International Investment Law & Policy 2008-2009* edited by Karl P. Sauvant (OUP USA 2009); Jürgen Kurtz, 'ADJUDGING THE EXCEPTIONAL AT INTERNATIONAL INVESTMENT LAW: SECURITY, PUBLIC ORDER AND FINANCIAL CRISIS' (2010) 59 *International & Comparative Law Quarterly* 325.

legal outcomes are incongruous to investment treaty jurisprudence as they will compound the already fragmented interpretations in the area. The few arbitral awards highlighted showed how arbitral tribunals have swayed between applying different approaches to interpret governmental actions/conduct and further determine whether investor's expectations have been breached. Perhaps, one may add here some of the disadvantages or problems of such an approach includes uncertainty in the law; accusation of tribunals applying the concept of legitimate expectations to justify personal interpretative preferences;<sup>32</sup> and threatening the legitimacy of the system.<sup>33</sup>

## **1.2 Research Question**

The research seeks to determine how investment arbitration could balance the protection of investor's legitimate expectations with state's legitimate regulatory functions. Therefore the main research question is as follows:

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<sup>32</sup> In 2009 a group of renowned academics of Public International Law including Sornarajah, Van Harten and Muchlinski etc issued a statement on the investment regime alluding to some of the problems identified herein. see; 'Public Statement on the International Investment Regime' (2011) 8 Transnational Dispute Management (TDM) <<http://www.transnational-dispute-management.com/article.asp?key=1657>> accessed 11 December 2014.

<sup>33</sup> On legitimacy crisis, see; M Sornarajah, 'A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration', *Karl Sauvant ed., Appeals Mechanism in International Investment Disputes* (Oxford University Press 2008) 39; 'The Coming Crisis in the Global Adjudication System' (2003) 19 *Arbitration International* 415; Susan D Franck, 'Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions, The' (2004) 73 *Fordham Law Review* 1521, 1521-1625; Noemi Gal-Or, 'Investor and Civil Society as Twin Global Citizens: Proposing a New Interpretation in the Legitimacy Debate, The' (2008) 32 *Suffolk Transnational Law Review* 271, 271-302; Christopher M Ryan, 'Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law' (2008) 29 *University of Pennsylvania journal of international law* 725, 725-761.

*'How can investment treaty tribunals formulate and apply the principle of legitimate expectations taking into account the state's legitimate regulatory and administrative functions?'*

In trying to answer the main question, the following sub questions emerge as follows:

- *What are the criteria for determining legitimate expectations in investment treaty arbitration?*
- *What are the factors to be considered in the determination of host state's legitimate regulatory functions?*

The main line of argument in answering the questions stems from the role of margin of appreciation in defining the contours of legitimate expectations in International Investment Law, and the need for balancing between investor's private interest and state's public interest. The thesis will therefore engage in a triangular discourse between the foreign investors, host states and investment treaty tribunals, and explore how the jurisprudence of ICJ, WTO, ECJ, ECtHR, IACHR, and ACHPR can help in balancing between investor's legitimate expectations and state's legitimate regulatory and administrative functions.

### **1.3 Aims of the Research**

There are two broad aims intended to be achieved by this research, namely;

- To conduct a comprehensive research on legitimate expectations in Investment Treaty Arbitration - Gap filling.
- To provide framework criteria for resolving the tension/conflict between foreign investor's expectations and state's legitimate administration in public interest – *balancing overlap by suggesting a benchmark/criteria for determining when LE might be constituted and/or breached.*

There is no comprehensive study of legitimate expectations under investment treaty arbitration.<sup>34</sup> The aim, therefore, is to fill this gap by conducting a comprehensive study of legitimate expectations in this area. The research would inquire deeply into the constituents of legitimate expectations, sources of the expectations, basis upon which expectations could be relied upon, and measures constituting frustration of legitimate expectations. The research will further determine how legitimate expectations can be identified, the process through which it is generated, and how it is breached. The criteria to be identified in the formulation of legitimate expectations will assist in fulfilling this aim. It is hoped that this part of the research will put together all the fragmented views of legitimate expectations and fill the gap in literature.

Moreover, both investor's legitimate expectations and state's legitimate regulatory functions are metaphorically viewed as two untamed tigers that

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<sup>34</sup> This fact is reflected in the forward note of Justice Stephan Schwebel contained in Professor Peter Cameron's book on International Energy Investment Law. See; Cameron (n 16).

need to be arrested in a balanced way. The research therefore, would try to balance between fulfilling investor's legitimate expectations and deference to states to regulate in the public interest. Thus, the overall aim of the research is to introduce a fair balancing structure within the investment treaty arbitration that would protect the legitimate expectations of the foreign investors on the one hand, and respects legitimate regulatory functions of the state on the other hand.

#### **1.4 Significance and Justification**

Quite expectedly, investor's expectations are conceived as being the *raison d'être* of most investment decisions. In view of this general perception, the role these expectations play in the regulation of foreign investment, particularly at international level, is fundamental. In addition, a systematic study of legitimate expectations in international investment law is imperative due to the ubiquitous reliance and reference to the principle of legitimate expectations by investment treaty tribunals as a mechanism for finding investment treaty violations. While in some disputes it is the Claimant that usually alleges frustration of its legitimate expectations, in certain disputes it is the tribunal in its analysis that refers to the investor's legitimate expectations to support findings of violation of treaty standards of protection. The requirement of legal certainty demands that investors need to know the relative threshold of their expectation to enable them design their investment fully aware of the associated risks. Host countries need to know their

limitations in terms their regulatory powers and their ability to respond to changing circumstances in the public interest. Practitioners in public service, private practice or in-house solicitors need to offer relative, but predictable legal opinion in matters regarding legitimate expectations in investment arbitration. Thus, the need for clarity in the area is momentous.

There are several reasons why this research is significant. **First**, due to the absence of a detailed study of legitimate expectations, a research of this nature that seeks to crack the formulation and application of the principle of legitimate expectations under international law, delineate its contours, would in a significant way try to fill the existing gap in the literature.

**Secondly**, the seemingly inherent conflicts of norms in public/private interest, deserves a fairly balanced approach purposely to douse the existing tension or harmonize the conflicting principles. The absence of a systematic balancing framework between investor's expectations and state regulatory functions is viewed in this research as a lacuna in the jurisprudence of investment treaty arbitration. Therefore, providing an analytical balancing tool would significantly aid investment tribunals to systematically balance between the investor's expectations and state's regulatory functions.

**Thirdly**, as identified under the research problem, uncertainty in the formulation of legitimate expectations and lack of clarity in its application



bedevilling the investment treaty arbitration is opening a legitimacy quandary over the entire jurisprudence. Foreign investment due to its long term nature and demand cannot be divorced from the necessity of a predictable legal environment. Domestic public administration by its nature is ever-changing. The public at large have a legitimate concern over investment operations as they are likely to be affected by the conduct of the investor or even their governments in their territories. Therefore a study that seeks to address uncertainty and lack of clarity in the arbitral practice of the investment treaty tribunals would significantly assist in assuaging the concern of the community, of investors, community of states and the generality of citizens in either the host state where the investment is taking place, home state of the foreign investor where the investment originated, or even a third state connected with the treaty through most favored nation clause. The research contribution envisaged by this work is towards the harmonious development of international investment law in general, investment treaty arbitration in particular, and creating *certainty of the rule of law in the system*. Thus, the significance of the work is global particularly, in view of the emerging conceptions of international investment law as specie of global administrative law.<sup>35</sup>

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<sup>35</sup> Benedict Kingsbury, Duke University. and School of Law., *The Emergence of Global Administrative Law* (School of Law, Duke University 2005); Benedict Kingsbury and Stephan W Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administration Law' [2009] 50 Years of the New York Convention: [ICCA International Arbitration Congress] 5; Benedict Kingsbury and Stephan W Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - the Concept of Proportionality' [2010] International investment law and comparative public law 75; Gus Van Harten and Martin Loughlin, 'Investment

The review of the existing literature suggests that the principle of investor's expectations, raises as many questions as it sought to answer. The notion straddles the entire chain of investment from making of an investment, fair and equitable treatment,<sup>36</sup> expropriation<sup>37</sup> up to dispute resolution and damages stage. The amorphous nature of fair and equitable treatment and the

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Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 European Journal of International Law 121.

<sup>36</sup> On Fair and Equitable Treatment Standard, see; CH Schreuer, 'Fair and Equitable Treatment (FET): Interactions with Other Standards' (2007) 4 Transnational Dispute Management (TDM) <<http://www.transnational-dispute-management.com/article.asp?key=1138>> accessed 12 December 2014; Theodore Kill, 'Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connections with Conventional Fair and Equitable Treatment Obligations' (2007) 106 Michigan Law Review 853; Ignacio Pinto-Leon, 'Fair and Equitable Treatment under International Law: Analyzing the Interpretation of the NAFTA Article 1105.1 by NAFTA Chapter 11 Tribunals' (2006) 15 Currents: International Trade Law Journal 3; Mahnaz Malik, 'Fair and Equitable Treatment' (IISD 2009) Bulletin No. 3 <[http://www.iisd.org/pdf/2009/best\\_practices\\_bulletin\\_3.pdf](http://www.iisd.org/pdf/2009/best_practices_bulletin_3.pdf)>; OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (OECD Publishing 2004) 2004/03 <[http://www.oecd.org/daf/inv/investment-policy/WP-2004\\_3.pdf](http://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf)>; Thomas J Westcott, 'Recent Practice on Fair and Equitable Treatment' (2007) 8 The Journal of World Investment & Trade 409; Jean Kalicki and Suzana Medeiros, 'Fair, Equitable and Ambiguous: What Is Fair and Equitable Treatment in International Investment Law?' (2007) 22 ICSID Review 24; J Roman Picherack, 'Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far, The' (2008) 9 Journal of World Investment & Trade 255; Sebastian Lopez Escarcena, 'The Elements of Fair and Equitable Treatment In International Investment Law' (Leuven Centre for Global Governance 2010) Policy Brief No. 14; Graham Mayeda, 'Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties' (2007) 41 Journal of World Trade 273; Jr D. Wallace, 'Fair and Equitable Treatment and Denial of Justice: Loewen v US and Chattrin v Mexico' (2006) 3 Transnational Dispute Management (TDM) <<http://www.transnational-dispute-management.com/article.asp?key=753>> accessed 13 December 2014.

<sup>37</sup> It is acknowledged here that direct expropriation cases have significantly reduced. Most of the cases now are on indirect expropriation. On indirect expropriation see; L Yves Fortier and Stephen L Drymer, 'Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor' (2004) 19 ICSID Review 293; Ursula Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State' (2007) 8 Journal of World Investment & Trade 717; Steven R Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law' (2008) 102 American Journal of International Law 475; Lorenzo Cotula, 'Regulatory Takings, Stabilization Clauses and Sustainable Development', *Best practices in promoting investment for development* (OECD 2008) <<http://www.oecd.org/dataoecd/45/8/40311122.pdf>>; Elyse M Freeman, 'Regulatory Expropriation under NAFTA Chapter 11: Some Lessons from the European Court of Human Rights' (2003) 42 Columbia Journal of Transnational Law 177.

interrelatedness of the standards is what enables the principle of legitimate expectations to encompass the entire chain of investment stages.<sup>38</sup> Most of the literature on investor's legitimate expectations dealt with the issue in a context-specific manner, adopting a narrow approach to the topic. **Orrego Vicuna**<sup>39</sup> wrote on the necessity of balancing regulatory rights of the states and the rights of individuals in the context of regulatory authority and legitimate expectations. The work predicted two legal standards, namely, 'discretionary powers subject to judicial control' and 'legitimate expectations' that are likely to influence constitutionalization, accessibility and privation of international dispute settlement. The work relies more on the jurisprudence of the World Bank Administrative Tribunal to strengthen the argument on the role of the principle of legitimate expectations. Vicuna's foretelling regarding the emerging role of legitimate expectations in the context of global citizenship and global protection seem to materialize with the emergence of global administrative law,<sup>40</sup> and other related approaches. Indeed, Vicuna's approach is much broader in comparison with this thesis. However, his view on the need for an international mechanism to protect individuals from abuse of state powers without overruling state legitimate functions is relevant to

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<sup>38</sup> Schreuer, 'Fair and Equitable Treatment (FET)' (n 36).

<sup>39</sup> Francisco Orrego Vicuna, 'Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society' (2003) 5 International Law FORUM Du Droit International 188; See also; Francisco Orrego Vicuna, 'Legitimate Expectation in the Case-Law of the World Bank Administrative Tribunal' (2006) 5 Law and Practice of International Courts and Tribunals 41.

<sup>40</sup> On global administrative law see; Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'Emergence of Global Administrative Law, The' (2004) 68 Law and Contemporary Problems 15.

this research and will be pursued. **Chester Brown**<sup>41</sup> provides preliminary thoughts on the justification of invoking protection of legitimate expectations as a general principle of law under international law. After a brief review of the application of legitimate expectations under national legal systems, and a few international tribunals, he pointed out the need to distinguish between the principle of legitimate expectations on the one hand and cases of unilateral declarations and estoppels on the other hand, on the ground that the former deals with a relationship between unequal parties (i.e. State v individual), while the latter deals with relationship between equal parties (i.e. State v state or private parties in contract). Chester's work is indeed preliminary and very specific due to its limitation to the recognition of legitimate expectations as a general principle of law. The illuminating distinction between legitimate expectations and cases of unilateral declarations and estoppel however, will be examined further since all the three principles could be analogized from the principle of good faith under international law. **Nick Gallus**<sup>42</sup> examines the origin of BIT standards of treatment, and why states sign BITs purposely to determine the relevance of the host state level of development in the application of minimum standards of treatment to contracting states. Relying on the obligation of states to fulfill investor's legitimate expectations, he argues for the incorporation of the host

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<sup>41</sup> C Brown, 'The Protection of Legitimate Expectations As A 'General Principle of Law': Some Preliminary Thoughts' (2009) 6 Transnational Dispute Management (TDM) <<http://www.transnational-dispute-management.com/article.asp?key=1303>> accessed 24 November 2014.

<sup>42</sup> N Gallus, 'The Influence of the Host State's Level of Development on International Investment Treaty Standards of Protection' (2006) 3 Transnational Dispute Management (TDM) <<http://www.transnational-dispute-management.com/article.asp?key=895>> accessed 13 December 2014.

state level of development in the analysis of legitimate expectations in particular and international standard of treatment as a whole. The article assumes the obligation of fulfilling investor's legitimate expectations without examining the diverse views in the area, and the factors giving rise to the expectations. His focus on the inexactness of legitimate expectations as the basis for considering the influence of the host state level of development is relevant to this research and will be examined further in the light of the framework set out for this research. **Prof James Crawford**,<sup>43</sup> in his work on the relationship between treaty and contract has identified legitimate expectations as one of the principles where there is tension between treaty text and contract. After reviewing the doctrinal arguments, along with two distinct sets of arbitral awards each taking a divergent approach, he favors a more restrictive approach on the determination of investor's legitimate expectations. According to Crawford, there is a tendency by the arbitrators in the expansive application of legitimate expectations to rewrite 'the arrangements agreed between the parties or override the 'source of the applicable law'.<sup>44</sup> **Newcombe and Paradel**<sup>45</sup> in their book on standard of treatments under international investment law dealt with legitimate expectations largely under fair and equitable treatment. In their view, legitimate expectations are one of the overlapping elements used by investment treaty tribunals to analyze the overarching standard of fair and

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<sup>43</sup> James Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24 *Arbitration International* 351.

<sup>44</sup> *Ibid* 374.

<sup>45</sup> Newcombe (n 21) 279–289.

equitable treatment. They contrasted procedural legitimate expectations mostly recognized in certain domestic jurisdictions, with a more robust approach by investment treaty tribunals where substantive expectations, expectations as to due process in decision making and expectations as to protection of economic rights and interests are all covered by the investment treaty jurisprudence. In their analysis, they largely relied on the arbitral awards. The section devoted to legitimate expectations in the book provide a useful background reading to this research. **Marrion Panizzon**<sup>46</sup> in her book on the Good Faith under the WTO Jurisprudence considered legitimate expectations as a core principle for her analysis. In a chapter to protection of legitimate expectations as GATT-specific Good Faith she traces the foundation and development of legitimate expectations from Article 31 of the Vienna Convention on the Law of treaties, GATT 47 to WTO Jurisprudence. Panizzon attributed the relevance of the principle of legitimate expectations in the WTO, largely due to the existence of gap and lacunae in the substantive principles and the consequent need to fill the gap and mend the lacunae. Drawing on her detailed analysis of various WTO cases, Panizzon identifies limitations set up by the appellate body to the application of legitimate expectations. Although, the book is solely dedicated to the WTO, it is relevant to this research, particularly because it deals with the root of legitimate expectations under international law and the concern raised by WTO scholars on the need for a harmonized rather than a fragmented international law. Similarly, the WTO case law referred to in the book will provide an

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<sup>46</sup> Panizzon (n 12).

illuminating insight to learn from the WTO approach. **Pandya and Moody**<sup>47</sup> reviewed the award of SDF (Services) Limited v Romania.<sup>48</sup> They identified three critical stages in the award as a step towards 'controlled approach'. In their view, representation, balancing, and deference are the key lessons to be learnt from EDF arbitral award and the English law application of legitimate expectations. Indeed, their review is critical to this research in view of its relevance and in-depth analysis. However, their approach of using English law alone to formulate their controlled approach for the use by international arbitrators is what this research finds as an insufficient approach to capture the global concern regarding the formulation and application of legitimate expectations. **Ioana Tudor**<sup>49</sup> in her book, on fair and equitable treatment, treated legitimate expectations as one of 'actual situations in which the fair and equitable treatment has been applied'. After observing that notion of legitimate expectations in cases of compensation and indirect expropriation, she concentrated her work on the nexus between legitimate expectations and fair and equitable treatment. Her analysis shows that the main uphill task in the formulation of legitimate expectations is in identifying the criteria for reasonableness involved. This tedious exercise led investment tribunals to solely limit their analysis to case-by case approach. In her view, there are exceptional cases whereby the determination of the legitimacy of investor's expectations is presumed. She concluded her analysis by ascribing lack of

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<sup>47</sup> Pandya and Moody (n 16).

<sup>48</sup> *SDF (Services) Limited v Romania ICSID Case NoARB/05/13* (ICSID).

<sup>49</sup> Ioana Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* (1 edition, Oxford University Press 2008).

transparency and good faith on the part of the state as the causes for violating investor's legitimate expectations. While her analysis is useful for providing background study to this research, her approach does not address the concern identified by this research, particularly, the exclusion of cases of indirect expropriation from her analysis. **Santiago Montt's**<sup>50</sup> work on state liability is germane to this research. The work analyses the jurisprudence of state liability using global administrative and constitutional law framework. The work also uses the comparative method to analyze the scope of property rights in bilateral investment treaty generation. His analysis of property rights between 'core' and 'periphery' led to a closer examination of BIT standards including legitimate expectations. While admitting that the protection of investor's legitimate expectations is a recent phenomenon in the jurisprudence of investment treaty arbitration, he classified the expectations into 'weak sense' and strong sense' expectations. Drawing inference from EU law, Montt concluded his analysis by identifying 'reasonableness' and 'legitimacy' of expectations as a crux to every analysis of the protection of legitimate expectations, and therefore, a gateway to a balancing approach by arbitrators. Apart from the relevance of the whole work to this research, the specific analysis of legitimate expectations is also relevant. On how the balancing proposed by Montt should be applied, is one of the crucial points where the work fell short of the pressing demands formulated by this research. **Professor Schreuer and Ursula**, wrote on the relevance of 'time' in

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<sup>50</sup> Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the Bit Generation* (Intl Specialized Book Service Inc 2011).



the determination of legitimate expectation. ie 'at what point in time does the investor's legitimate expectation commence'.<sup>51</sup> While their finding on the need for tribunals to adopt a multifaceted approach to ascertain the 'relevant time' requirement is useful for this research, their focus however is very specific and somewhat narrow for this research. Also **Elizabeth Snodgrass**<sup>52</sup> gave a detailed account of the justification of using the principle of legitimate expectation as a general principle of law recognized by civilized nations. Elizabeth's work, however, apart from its narrow approach of not looking at other international regimes that applies legitimate expectations, further left out the need for balancing investors' expectations and public interest unequivocally to further research. **Michael Reisman and Arsanjani**<sup>53</sup> in a brief article examined the likelihood of the binding character of state unilateral statements in the context of investment arbitration. Their work, however, apart from being devoid of an in-depth analysis regarding reliance on such unilateral undertakings, is limited to actual undertakings while the scope of legitimate expectations currently under review includes expectations arising from an established regulatory framework. **Walter** while analyzing the tentacles of legitimate expectations contends that the plethora of different contexts, in which arbitral tribunals employ the principle of 'legitimate expectations' in international investment dispute resolution, may imply that

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<sup>51</sup> Schreuer C. and Kriebaum U (n 21).

<sup>52</sup> Elizabeth Snodgrass, 'Protecting Investors' Legitimate Expectations - Recognizing and Delimiting a General Principle' (2006) 21 ICSID Review 1.

<sup>53</sup> Reisman and Arsanjani (n 20).

the concept is a panacea for all unresolved matters.<sup>54</sup> Indeed, this may not necessarily reflect the actual position. As he rightly pointed out 'the precise contours of the concept, the conditions for its application and its legal foundations remain only scarcely explored'.<sup>55</sup> Further it may be notoriously difficult for an arbitrator to establish what is legitimate and what is not, this at times being contingent on his different 'cultural traditions and subjective convictions'.<sup>56</sup> Walters's work admittedly is germane to this research not for its answers, but for the thoughts raised in the last part. As admitted by Walter, the work was intended to give an overview.<sup>57</sup>

Furthermore, **Muchlinski** refers to investor's conduct as being central to defenses against investors' claims. Muchlinski argues that arbitral tribunals will make use of such principles as good faith and responsible business practice, which include, *inter alia*, a duty to invest with adequate knowledge of risk, to render opinions as to breach of investor's legitimate commercial expectations, which fall under the purview of a broader notion of fair and equitable treatment.<sup>58</sup> Muchlinski further asserts that the fair and equitable treatment can be encapsulated, *inter alia*, by addressing the question of whether a host state *and investor, to his best standard of care and due diligence*, are

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<sup>54</sup> A von Walter, 'The Investor's Expectations in International Investment Arbitration' (2009) 6 Transnational Dispute Management (TDM) <<http://www.transnational-dispute-management.com/article.asp?key=1361>> accessed 25 November 2014.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Peter Muchlinski, 'Caveat Investor - The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard' (2006) 55 International and Comparative Law Quarterly 527, 556.

keeping to the ‘underlying bargain’ between them.<sup>59</sup> While Muchlinski’s proposal is apt, the paper is silent on how investment tribunals could determine investors’ expectations. **Cameron** underlines the importance of ‘stability and predictability of the legal and business framework’, being a dimension to the interpretation of fair and equitable treatment standard, which create relevant investor expectations as a result of the host state’s promises. He also stresses the obscure nature of this notion as it begs the question as to whether the promises have ever been made and, if yes, how extensive these promises are.<sup>60</sup> But no mention was made regarding balancing criteria to be used by investment treaty tribunals in the determination of investor’s legitimate expectations. **Sharpston** noted on the regulatory framework, that a prudent business operator must be aware of the likely regulatory changes affecting their sector. Sharpston’s work is quite relevant in view of the comparative approach adopted in this research. It must be noted, however, Sharpston’s work does not analyse a single investment treaty arbitral award.<sup>61</sup>

Similarly, in the jurisprudence of creeping expropriation there is an extensive scholarship on regulatory takings with no bright line test between regulatory expropriation and legitimate regulation.<sup>62</sup> While the jurisprudence is germane to the study of legitimate expectations as it relates to the appraisal of state

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<sup>59</sup> Muchlinski (n 58).

<sup>60</sup> Cameron (n 21) 326.

<sup>61</sup> Sharpston (n 19) 128.

<sup>62</sup> Fortier and Drymer (n 37).

legitimate regulatory powers, the study is insufficient to capture the demand of balancing between an investor's expectations and state's legitimate regulatory functions, particularly when the constituents of investor's expectations fell short of the requirement of expropriation.

It is submitted that while acknowledging that some writings have touched on the principle of legitimate expectations, no comprehensive attempt was made to analyse the principle of legitimate expectations from the perspective of balancing it with state's legitimate regulatory functions in investment arbitration in a systematic way. Hence, the review of the existing scholarship seems to overwhelmingly suggest that a growing proportion of research is revealing the inadequacies of the very legal foundations of concepts such as 'legitimate expectation'. More importantly, another conclusion from this review is that this research is crucial to bridge the current gap in order *to justify* the reasoning of arbitral decisions. It is necessary also to preclude potential criticism, which might arise as a result of claims that issues of public policy are left in the hands of private arbitrators.<sup>63</sup>

## **1.5 Analytical Framework**

The principle of margin of appreciation developed mainly in human rights jurisprudence<sup>64</sup> provides a useful tool for analysis in this research. The term

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<sup>63</sup> Walter (n 54) 34; Harten (n 22) 152-184.

<sup>64</sup> Human rights protection mechanisms are divided into universal and regional. At the universal level the International Covenant for Civil and Political Rights is the main instrument, while at the regional level there is African charter on Human and Peoples Right,

margin of appreciation has been broadly understood as ‘a line at which international supervision should give way to a state party’s discretion in enacting or enforcing its laws.’<sup>65</sup> It also refers to the latitude or discretion afforded to domestic state organs by the international judicial organs in complying with their obligations.

The notion of margin of appreciation as understood in general international law is a mechanism through which flexibility can be manifested in the operation of law with the aim of balancing competing obligations within the international community. The principle is deployed mostly in the areas of law where there is a lack of legal precision or the norms are warped with legal indeterminacy. As a judicial balancing principle within the inherent powers of judicial bodies, it does not require specific authorisation or explicit mention; it is inferred from a legal norm as a logical consequence.<sup>66</sup>

The principle has been applied mostly in the three major areas of international law, namely, Humanitarian law, WTO jurisprudence, and Human rights.<sup>67</sup> In

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European Convention on Human Rights and Inter-American Convention on Human Rights. Apart from International and three major regional mechanisms for protection of human rights, there are other human rights mechanisms such as Arab League, South Asian Association for Regional Cooperation (SAARC), and Organisation of Islamic Conference (OIC). See; Prof Javaid Rehman, *International Human Rights Law* (2 edition, Longman 2009) 352–396.

<sup>65</sup> Wing-wah Mary Wong, ‘Sunday Times Case: Freedom of Expression Versus English Contempt-of-Court Law in the European Court of Human Rights’ (1984) 17 *New York University Journal of International Law and Politics* 35, 58; Howard C Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff Publishers 1996) 13–15.

<sup>66</sup> Jean-Pierre Cot, ‘Margin of Appreciation’, *Max Planck Encyclopedia of Public International Law* (2007).

<sup>67</sup> *Ibid.*,

the field of humanitarian law the application of the principle relates to balancing international law norms on prohibition of use of force on one hand, and the justification for using the same for self-defense, in good faith and as a necessary measure. Most of the International Court of Justice jurisprudence on the principle of margin of appreciation falls within this area. The nature of the humanitarian cases is interstate. Therefore, the jurisprudence of humanitarian law is of little relevance to this research due to its peculiarity of belonging to a different domain and the nature of the contested issues as belonging to the public - public and not public-private issues. The WTO jurisprudence on standard of review developed by the WTO Panels and the Appellate body can be synonymised with margin of appreciation.<sup>68</sup> The core concern in the WTO standard of review is balancing between the relinquished authority by the member states to the WTO jurisdiction, and the retained authority by the states. Some of the doctrinal writings in the area examined, among other things, concerns whether the WTO is a system of total review or total deference? Is it a system of 'different states, different policies'? Or a system of 'one world, one policy'?<sup>69</sup> Regardless of various perspectives on these questions, the WTO jurisprudence<sup>70</sup> indicates prevalence of judicial review with some restraints on the member states.<sup>71</sup> Therefore, the jurisprudence of, both, the panels and the Appellate body are relevant and

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<sup>68</sup> Stefan Zleptnig, 'The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority' (2002) Vol 6 <<http://eiop.or.at/eiop/texte/2002-017a.htm>>.

<sup>69</sup> AT Guzman, 'Determining the Appropriate Standard of Review in WTO Disputes' (2009) 42 Cornell Int'l LJ 45.

<sup>70</sup> Ibid.

<sup>71</sup> Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16 European Journal of International Law 907, 929.

will be referred to, to the extent of their relevancy in clarifying the legal principles involved in this research.

The principle of margin of appreciation developed largely in the jurisprudence of human rights is quite germane and very useful tool identified in the analysis of legitimate expectations. The basis of using margin of appreciation to analyse the scope of protection to be afforded to foreign investors under legitimate expectations is founded on the analogy between individual rights under the human rights jurisprudence and investor's right under international investment law, particularly, the human rights jurisprudence that deals with right to property. Thus, the right based approach shall be looked at as the "gateway" of legitimate expectations, and will be examined in the light of margin of appreciation.

It is expected, that transposing margin appreciation to investment treaty arbitration would enable the tribunals to recognise the basic freedom of the states to legislate in the general economic interest whilst also taking into account the legitimate expectations of private economic operators for legitimate stability in the legal framework for the purposes of investment. Indeed, in investment Treaty context, the tribunals have controverted over the recognition and the relevance of the doctrine. While some tribunals have rejected the relevance of the doctrine completely, others have acknowledged its relevance at least in the assessment of situations deserving necessary

measures by states. However, to date, no investment treaty tribunal has yet offered a clear and systematic application of the doctrine, particularly in the blurred areas dealing with violation of fair and equitable treatment, indirect expropriation or more profoundly the principle of legitimate expectations. This is critical to the jurisprudence, particularly in the case of findings of violation of legitimate expectations due to its inherent interface with a public interest dimension of regulatory and administrative functions of states within the national legal orders of states.

## **1.6 Methodology**

- Doctrinal Research:
- Comparative Research:

Legitimate expectations under investment treaty arbitration can be approached from various perspectives; this work employs doctrinal analysis and a comparative approach from a legal perspective. In essence, the jurisprudence of investment treaty tribunals would be analysed, and particularly the aspect of arbitral awards, dealing with fair and equitable treatment and indirect expropriation. The reason for focussing on the arbitral awards is because international investment law is largely developed through arbitral awards. As late Professor Thomas Walde stated;

*“...modern international investment law develops now mainly out of cases, and less out of treaties. Treaties may provide a jurisdictional basis, a structure of argument and major concepts to start and categorize the required more line of enquiry, but the way treaty language develops into operative law- i.e. specific principles and rules governing case law. This is the normal way law develops – with codifications either laying a foundation of concepts and*



*structure of arguments at the beginning or, towards the end, collecting and restating evolved case law.”<sup>72</sup>*

Moreover, all sources of public international law that could accommodate the principle of legitimate expectations would be doctrinally analysed to justify the application of the principle. In the systematic construction of investor’s legitimate expectations, the knowledge of the investor regarding certain elements such as the peculiarities of the host country, the time factor, sources of the expectations (person creating the expectation), reliance, changing circumstances, and conduct of the investor would be analysed.

Moreover, relying on the comparative approach, the jurisprudence of investment treaty tribunals would be compared with General International Law, WTO, and Human rights jurisprudence. The focus is to analyse most importantly, the jurisprudence of PCIJ, ICJ, WTO Panels and Appellate body, ECJ, the European court of human rights, and other regional human rights systems such as the African Court of Human and People’s Rights, and the Inter-American system of human rights. The comparative approach would enable the research to first, analyse how the principle of legitimate expectations is formulated and applied in the aforementioned adjudicative bodies. Secondly, transpose the principle of margin of appreciation to balance between investor’s legitimate expectations and states legitimate regulatory

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<sup>72</sup> (†) TW Wälde, ‘International Investment Law: An Overview of Key Concepts and Methodology’ (2007) 4 Transnational Dispute Management (TDM) 4 <<http://www.transnational-dispute-management.com/article.asp?key=1025>> accessed 1 January 2014.

functions. The central theme adopted in the research question is, injecting margin of appreciation in the determination of investor's legitimate expectations and states legitimate regulatory function can provide a judicial guide for balancing the normative conflict of private and public demands in the analysis of fair and equitable treatment and indirect expropriations. Therefore, the margin of appreciation, as a legal and judicial analytical tool, can facilitate draining the tension between private and public interests and resolution of the conflicting legal principles.

Indeed, the overall methodology entails analysis of fair and equitable treatment and indirect expropriation provisions in bilateral and multilateral investment treaties, national constitutions, legislations, guidelines or regulatory framework, contractual undertakings, nature of the governmental measure and all factors giving rise to investor's legitimate expectations or state's regulatory functions in the light of margin of appreciation.

### **1.7      *Scope and Limitations***

The scope of the research is limited to the principle of investor's legitimate expectations founded on the general provisions of fair and equitable treatment contained in the bilateral investment treaties. None admitted investments or property rights below treaty protections do not fall within the coverage of this work. The research is further limited to the intersection

between domestic administrative systems and international investment law to the extent they relate to adjudication and dispute settlement. Mere Policy formulations of administrative systems will not fall within the purview of this research, except where such policies constitute a clear state measure affecting foreign investor. Furthermore, the research is limited to how investment treaty tribunals formulate and apply the principle of legitimate expectations and state regulatory functions, therefore detailed foundational arguments and theories of property rights or legitimacy in governance are outside the purview of this work.

Indeed, another limitation to the study is the differences in the treaty text. This limitation, supports the legal adage that treaty binds only its parties. Same limitation also applies to arbitral awards as they bind only the parties to the award. Therefore, it is difficult to justify a generic study of various investment treaties and arbitral awards. However, the limitations notwithstanding, treaty text regarding substantive protections are the same in most bilateral and multilateral investment treaties. Similarly, the adjudicatory method (the crux of my research) seems to debunk this reasoning as well, as tribunals do rely on their previous awards, regardless of the parties involved. Therefore, the differences can be surmounted on the basis of relevancy and commonality of the treaty substantive principles<sup>73</sup> and common methodology in the reasoning of investment treaty tribunals.

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<sup>73</sup> For instance in *Duke v Ecuador* the tribunal relies on *Azurix v Argentina* and *CMS v Argentina* on the interpretation of fair and equitable treatment and hold that the standard are

Lastly, there is an inherent limitation applicable to most comparative studies that; the comparators may not match in all respects. This limitation is acknowledged, except the research is relying on functionalism where the main focus is on the outcomes. In addition, in this type of research (ie comparative judicial practice) there are concerns of potential judicial law making given the latitude of the discretionary powers of an adjudicator in comparative judicial analysis, thus, susceptible to abuse. In legal research, however, adjudicators are notoriously known for relying on precedents, and where none exist, they transpose from precedents decided in other regimes. Therefore, the role of adjudicators is no longer passive but active. In the wordings of Sir Elihu Lauterpacht:

*'Judicial law-making is a general phenomenon in societies where justice is administered by judicial tribunals....international tribunals, by the very nature of the judicial function, are not confined to a purely mechanical application of the law.'*<sup>74</sup>

## 1.8 Structure of Thesis

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the same. see; *Duke v Ecuador Case No ARB/04/19* [para 364]; For instance in *Duke v Ecuador* the tribunal relies on *Azurix v Argentina* and *CMS v Argentina* on the interpretation of fair and equitable treatment and hold that the standard are the same. See para 364. As to why arbitrators rely on previous awards, Bjorklund attributed the reliance on what she termed 'formal' and 'informal' pressures. In the case of the former the arbitrator's concern is protecting the reputation and their expertise, while in the case of the later, their concern is borne by the ethical sense to create a predictable jurisprudence and fulfil the legitimate expectations of the public. see; Andrea K Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante', *International Economic Law: The State and Future of the Discipline* (Bloomsbury Publishing 2008) 265-280.

<sup>74</sup> Elihu Lauterpacht, 'The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals', *International Law: Volume 5 , Disputes, War and Neutrality, Parts IX-XIV: Being the Collected Papers of Hersch Lauterpacht* (Cambridge University Press 2004) 210.

The thesis is divided into three parts containing a total of seven chapters. Part One contains chapters one and two. Chapter one deals with the general introduction of the research, the scope of the research to be carried out, and the introduction of the analytical framework of the research. Chapter two examines the doctrine of the margin of appreciation as the analytical framework of the thesis. The chapter traces the origin and development of the doctrine from both domestic and international law corpus. The chapter identifies the key functions of the doctrine to evaluate its suitability in analyzing investor's legitimate expectations.

Part two of the thesis contains chapters three, four, and five respectively. Chapter three examines the principle of legitimate expectations as formulated and applied by investment treaty tribunals. The chapter identifies the basis for applying legitimate expectations in general, and the conception of the principle in international investment law. The objective of the chapter is to lay proper foundation for providing an analytical account of how investment treaty tribunals formulated and applied the principle of investor's legitimate expectations. Chapter four analyses the conception of legitimate expectations in general international law and WTO. The jurisprudence of PCIJ, ICJ and early international tribunals on "expectation-related" principles are reviewed with a view to distill relevant and common elements in the adjudication of such principles. In addition, the jurisprudence of WTO on legitimate expectations is also examined. Chapter five traces the conception of legitimate

expectations in EU law with specific emphasis on the jurisprudence of the ECJ and ECtHR. The jurisprudence of both Courts provides a useful comparative tool in understanding the problems bedevilling the coherent application of the principle in investment treaty jurisprudence.

Part three contains chapters six and seven. In Chapter six the thesis assembles the totality of elements needed for coherent formulation of investor's legitimate expectations and more importantly, the lessons learnt from chapters four and five. The chapter further proposes the new conception of the investor's legitimate expectations from the prism of margin of appreciation. In developing the proposal, the thesis dwells on answering the research question posed by the thesis as a whole. The chapter concludes with a synthesis of the new methodology towards the formulation and application of investors' legitimate expectations. Chapter seven provides an overall conclusion of the research.



## Chapter II: Analytical Framework - *The Doctrine of Margin of Appreciation*

### 2.0 Introduction

This chapter introduces the doctrine of margin of appreciation as an analytical lens through which the concept of “legitimate expectations” could be explained and applied by investment treaty tribunals. The doctrine of margin of appreciation as developed in PCIJ/ICJ, WTO, ECJ and regional human rights courts could provide a useful tool for analysing legitimate expectations in investment treaty arbitration. The doctrine is broadly understood in the arena of multilateral integration arrangements, as ‘a line at which international supervision should give way to a state party’s discretion in enacting or enforcing its laws.’<sup>75</sup> In this context, it entails the latitude or discretion afforded to domestic state organs by international judicial organs in determining the level and manner of individual national compliance with the international legal arrangement. This Chapter seeks to first, trace the evolution of the doctrine of margin of appreciation in international law. Secondly, it examines the theoretical basis upon which the doctrine is based, and thirdly analyses the application of the doctrine by the international courts and tribunals. The central argument adopted in this chapter is the proposition that margin of appreciation is a suitable tool for analysing the operation and the reach of legal rights and could further aid international courts and

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<sup>75</sup> Wong (n 65) 58; Yourow (n 65).



tribunals to strike a balance vertically and horizontally between competing rights or obligations among parties, including parties to an investment dispute.

## **2.1 Overview of the Doctrine**

The doctrine of margin of appreciation is a judicial balancing method that introduces flexibility in the operation of law with a view to balance competing rights and obligations. As a balancing method, it is normally inferred from legal norms as a logical consequence within the inherent powers of judicial bodies.<sup>76</sup> International Courts and tribunals have inherent powers to apply judicial tools in the administration of justice. These powers include the ability of the courts and tribunals to apply general principles of law and to objectively administer justice, all within their overall 'judicial functions'.<sup>77</sup>

Historically, the doctrine is traced back to administrative and constitutional laws of various civil law jurisdictions.<sup>78</sup> The French administrative law concept of 'marge d' appreciation'<sup>79</sup> and the German administrative law concept of Beurteilungsspielraum<sup>80</sup> have been identified as bedrocks to the current understanding of margin of appreciation under international law.

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<sup>76</sup> Jean-Pierre Cot (n 66) 1.

<sup>77</sup> Chester Brown, *A Common Law of International Adjudication* (Oxford University Press 2009) 60–82.

<sup>78</sup> Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia nv 2002) 2–3.

<sup>79</sup> Richard Clayton QC and Hugh Tomlinson QC, *The Law of Human Rights* (2nd edn, OUP Oxford 2009) 314.

<sup>80</sup> Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (Martinus Nijhoff Publishers 1998) 218.

Both the French and German systems have a matured system of administrative and constitutional law and are quite rich in judicial review.<sup>81</sup> The French concept of 'marge d' appreciation' refers to a method of reviewing legality of administrative action and exercise of discretionary powers.<sup>82</sup> Similarly, the German concept of Beurteilungsspielraum refers to limited judicial review and deference to administrative bodies. Kokott describes the German concept as 'material limitations of the scope of judicial review' since at times the courts must ratify administrative decisions due to the closeness of the administrative agencies to the problems in dispute than the courts.<sup>83</sup> English law, on the other hand, is arguably not a strong competitor with civil systems in the fields of administrative law and constitutional law. However, the principles of 'reasonability' and 'discretion' have been considered as closest to proportionality<sup>84</sup> which is an element in the doctrine of margin of appreciation.

Under International law, the doctrine of margin of appreciation has been developed extensively by the European Court of Human Rights. As Macdonald pointed out, the doctrine 'is now the primary tool of the Court'<sup>85</sup> in the application of the European Convention on Human rights. In addition to the European Court of Human Rights, the European Court of Justice,

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<sup>81</sup> Thomas (n 6) 12.

<sup>82</sup> Yourrow (n 65) 14.

<sup>83</sup> Julian Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and ... on the Settlement of International Disputes* (Brill 1998) 219.

<sup>84</sup> Thomas (n 6) 88.

<sup>85</sup> R. St. J. Macdonald, 'The Margin of Appreciation', *The European System for the Protection of Human Rights* (Kluwer 1993) 88.

(ECJ),<sup>86</sup> the International Court of Justice (ICJ),<sup>87</sup> the World Trade Organisation (WTO)<sup>88</sup>, and other regional human rights courts and commissions have all directly or indirectly recognised the doctrine.

The basis of applying the doctrine of margin of appreciation include inherent powers of courts and tribunals, relevant enabling provisions of law, and general principles of law. First, the inherent powers of courts as a source of applying margin of appreciation denotes that international courts and tribunals have powers to apply the doctrine as an attribute of their adjudicative function, or pursuant to their implied powers.<sup>89</sup> Secondly, treaties and statutes establishing international courts and tribunals do provide for their adjudicative powers.<sup>90</sup> Thirdly, the doctrine of margin of appreciation could be placed within the general principles of law, thereby

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<sup>86</sup> *Case- 265/87 Bela Muhle Josef Bergmann KG v Grows-farm GmbH & co KG* [1977] ECR 01211, 1215.

<sup>87</sup> *SS Lotus (Fr V Turk)*, [1927] PCIJ (Ser. A) No. 10 (Sept. 7); *Oil platforms (Islamic Republic of Iran v United States of America)*, Judgement, (ICJ Reports); *Germany v United States (La Grand)* ICJ, [2001] ICJ Rep 466 (ICJ); for the analysis of ICJ's reference to margin of appreciation see; Shany (n 71) 907-940.

<sup>88</sup> *European Communities - Measures Affecting Asbestos or Products Containing Asbestos WT/DS135/AB/R* (Appellate Body) [paras 168-175]; (Appellate Body) [para v (c)]; *Brazil-Measures Affecting Imports of Retreaded Tyres WT/DS332/AB/R* (Appellate Body) [para 210].

<sup>89</sup> Shany (n 71) 911; On inherent powers of court generally see; Brown, *A Common Law of International Adjudication* (n 77); Weis Freidl, 'Inherent Powers of National and International Courts: The Practice of the Iran-US Claims Tribunal' in Christina Binder, Ursula Kriebaum and August Reinisch (eds), *International Investment Law for the 21st Century* (Oxford University Press 2009) 185-199  
<<http://oxfordindex.oup.com/view/10.1093/acprof:oso/9780199571345.003.0012>> accessed 14 December 2014.

<sup>90</sup> International Court of Justice Statute Article 38; Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement) 1868 U.N.T.S. 279, Article 17.6; Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) 1869 U.N.T.S. 401; 33 ILM 1226 (1994) Article 11; European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 2007/C 306/01, 2007 Article 5; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (opened for Signature 18 March 1965, Entered into Force 14 October 1966) (the ICSID Convention) 1965 Article 42.

forming part of applicable principles in international adjudication. Indeed, the later approach appears to be the approach taken by ECJ regarding its application of proportionality.<sup>91</sup>

Margin of appreciation as a judicial construct is difficult to describe in abstract terms. Of recent, the doctrine has attracted diverse scholarship in international law. Different perspectives emerge on the correct label to the doctrine. Is it margin of appreciation, Proportionality, or a combination of both? William W. Burke-White and Andreas von Staden<sup>92</sup> are of the view that margin of appreciation encompasses proportionality. In particular, margin of appreciation consists of legitimacy test, suitability test, necessity test, and proportionality test. They further argued that the fourth test, i.e., proportionality, should be *light* since strict proportionality can only be materialised in a constitutional setting where socio–political matters are contextually framed.

Alec Stone Sweet and Jud Mathews<sup>93</sup> on the other hand, describe the same methodological tests as proportionality balancing. They argued that proportionality analysis consists of: a) Legitimacy, b) Suitability, c) Necessity and d) Proportionality (strict). Indeed, the point of departure between the two

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<sup>91</sup> Jurgen Schwarze, *European Administrative Law* (Revised edition, Sweet & Maxwell 2006) 710–716.

<sup>92</sup> WW Burke-White and A Von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations' (2009) 35 *Yale Journal of International Law* 283. (Hereinafter, Burke-White and Von Staden)

<sup>93</sup> AS Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Colum. J. Transnat'l L.* 72.

contending views lies in the last stage of the exercise. Burke-White and Von Staden clearly disregarded strict proportionality as it is likely to favour private right against public interest, in addition to capacity lacking by international courts and tribunals to engage in such exercise. Alex Stone Sweet and Jud Mathews favours strict proportionality. According to the later view, strict proportionality would enable the courts and tribunals to engage in a creative balancing that does not severely restrict private right. Indeed, their divergent account on the doctrine is not new. In the context of human rights, there exists a discussion on the relationship between margin of appreciation and proportionality much before the current attraction to the doctrine. According to Macdonald:

*“Much of the discussion of the margin of appreciation by the court and commentators illustrates a disappointing lack of clarity. Being concerned with the appropriate scope of review, the margin is not susceptible of definition in the abstract, as it is, by its very nature, context-dependent. To search for its ‘ambit’ or ‘scope’ in the abstract again misunderstands its nature and leads to tautology...”<sup>94</sup>*

Contextually, while I do not differ substantially with the two contending accounts, however, their divergent structural account of margin of appreciation deserves further enquiry. In what follows in this chapter, I try to move the discussion further, by deconstructing the existing accounts of the doctrine as mere functional elements with the aim of properly yielding the various individual tests directly from the judicial cases to be analysed.

## **2.2 Function of the Doctrine**

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<sup>94</sup> R. St. J. Macdonald, (n 85) 85.

As noted earlier, the function of margin of appreciation is essentially to enable courts and tribunals engage in the balancing exercise as between contending rights and duties of parties on a dispute. Judicial balancing refers to process of evaluating competing interests and values as opposed to mechanical application of law. In judicial parlance, balancing is not without opposition since its inception in international adjudication. In Belgian linguistic cases<sup>95</sup> where the majority of the court opts for balancing Judge Terje dissented on the ground that balancing approach could move the court into the middle of internal politics of the member states.

The balancing function of margin of appreciation is in two dimensions, namely, *vertical* and *horizontal*. In the vertical sense, the function of margin of appreciation is to balance between the powers of international courts/tribunals and sovereignty of states. This is also referred to as *deferential balancing*. While in the horizontal sense, the balancing takes place as between competing interests at stake (proportionality balancing).

a. Vertical (Deferential) balancing:

The Vertical or Deferential balancing element of margin of appreciation deals specifically with balancing between sovereignty of states and judicial powers of international courts and tribunals. The concern in deferential balancing is how to delineate the scope of review to be exercised by the international courts or tribunals. This type of balancing has its roots in the competence of

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<sup>95</sup> *Belgium v Belgium A 6* (1968); EHRR 252, [101].

various administrative state organs in particular, and the overall conception of state as regulatory state.<sup>96</sup> Domestic public bodies are empowered by law to administrate in the public interest. Therefore, their space of legality, manoeuvre and administrative latitude needs to be defined and recognised by international adjudicators. Hence, deferential balancing enables an adjudicator to accord domestic executive, legislative and judicial bodies their margin of respect. As remarked by some commentators, this form of balancing is informed by the recognition of the tension, domestic regulatory bodies are confronted with in terms of balancing between competing interests at the domestic level and the need to protect private rights.<sup>97</sup> In determining deferential balancing, International courts and tribunals are normally concerned with the *prima facie* legitimacy of the state measure.

b. Horizontal (Proportionality) Balancing) :

Horizontal (Proportionality) balancing element of margin of appreciation deals with competing interests notably as concerning preference and weight to be given between private right or interest and overall public interest. Thus, this function is concerned with legality of a state measure purportedly in the public interest and the justification of interference with a private right or interest. The function entails that while public bodies are empowered by law to act in the public interest, in the event such act collides with a private interest, the courts must evaluate the action taking into the private interest

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<sup>96</sup> Montt (n 50) 183.

<sup>97</sup> AM Slaughter and LR Helfer, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 YALE LJ 273, 316.

and balance the competing interests at stake. International courts and tribunals have developed numerous tests to balance such competing interests. In particular, the courts apply suitability, necessity, and proportionality tests. Suitability test requires the state measure to suit the purpose sought to be achieved, while Necessity test would justify the state measure only 'if no less restrictive measure exists to achieve its objective'.<sup>98</sup> Lastly, proportionality is simply the actual evaluation of the challenged measure against the private interest in issue.

Accordingly, margin of appreciation is wide enough to accommodate both deference and proportionality within its vertical and deferential functions. In the following section, the theoretical basis of the doctrine is explored to lay foundation for examining how international courts and tribunals applied the doctrine.

### **2.3 Theoretical basis of Margin of Appreciation**

According to Allot, legal theories can be structured in three interactive levels to explain a legal phenomenon.<sup>99</sup> These levels are practical theory, pure theory, and transcendental or theory of theory. This thesis proposes in what follows to use Allots structural classification of theories to explain the theoretical basis of margin of appreciation.

#### **a. Practical theory:**

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<sup>98</sup> Schwarze (n 91) 858.

<sup>99</sup> Philip Allott, *Eunomia: New Order for a New World* (Oxford University Press 2001) 31.



Practical theory consists of set of ideas explaining why certain actions are willed.<sup>100</sup> In the context of this work, the practice of international courts and tribunals in applying the doctrine of margin of appreciation represents the willed action. In deducing such ideas explaining why the application of margin of appreciation, international courts and tribunals though not engaging in making legal theories are bound to state at least immediate reasons behind their judgements and decisions. Some of the reasons offered by the courts include Institutional competence, Democratic legitimacy and Diversity.

i. Institutional competence

Institutional competence as a practical theory to the application of margin of appreciation recognises that courts and tribunals generally are institutionally incapacitated to engage in scrutinizing complex public interest dimension of many regulatory and administrative functions of states. Hence, margin of appreciation becomes not only due but necessary in order for the relevant state functionalities to effectively perform their functions without strict legal interference from courts and tribunals. Institutional competence theory further recognizes that while some policy issues are technical, others are highly scientific and require specialised expertise which courts could do no more beyond interpreting simplified evidence in those issues. Similarly, international courts and tribunals, many a times are not better placed to engage in full scrutiny of public interest issues due to time constraint. Certain

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<sup>100</sup> Ibid.

public measures are time-bound. Their scrutiny and evaluation, however, could take longer time beyond what is ordinarily at the disposal of an international courts and tribunals. In **United Kingdom v Council** (Working time Directive), the ECJ while applying the doctrine of margin of appreciation held:

*“The Council must be allowed a wide discretion in an area which, as here, involves the legislature in making social policy choices and requires it to carry out complex assessments.”*<sup>101</sup>

ii. Democratic Legitimacy

In democratic setting, both legislative and executive functions are carried out pursuant to the democratic mandate given to those engaged in executing public functions. Consequently, public and other sovereign functions are clothed with democratic legitimacy and therefore presumed as functions underpinned by collective public choices made by representatives of individuals.<sup>102</sup> While individual members of society reserve their right to express their discontent on political choices made on their behalf against their representatives in democratic polls, they do not possess any retaliatory tool against judicial bodies, particularly, international adjudicators, when the later meddled into such domestic policies. Therefore, margin of appreciation as a judicial balancing tool is needed to supplement public choices made by people through their representatives without arbitrarily sacrificing private right. More importantly however, national authorities are much closer to

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<sup>101</sup> Case C-84/94 *United Kingdom v Council (Working time Directive)* (1996) 1-5755 ECR para 58.

<sup>102</sup> Shany (n 71) 920.

people and their surroundings than an international judge or arbitrator. In *James v United Kingdom* the Court held:

*“...because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the ‘public interest’...”*<sup>103</sup>

### iii. Diversity

One of the practical theories that could assist in explaining the doctrine of margin of appreciation is that of diversity and its corollaries, such as pluralism and heterogeneous nature of global communities. At least, in the context of human rights, all the regional courts/commissions in express or implied terms subscribe to the diversity argument as a justification for flexibility, a term which margin of appreciation is associated with. A diverse, plural and multicultural society could satisfy its international obligations and commitments in various means. An international adjudication conceived in a diverse framework could equally appeal to the diversity and pluralism of its surroundings. In **CRP and Anor v Nigeria**, the African Commission while analyzing the provisions of the African Charter on Human Rights concluded that *“The African Charter should be interpreted in a culturally sensitive way...”*<sup>104</sup>

Indeed, the above mentioned practical theories are not exhaustive. They however provide a moderate premise upon which further enquiries could be made relative to the practical theories of margin of appreciation. What

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<sup>103</sup> *James v United Kingdom* [1986] EHRR 126 [para 46].

<sup>104</sup> *CRP and Anor v Nigeria* [2000] AHRLR 235 [26].

appears to be the 'core' in the practical theories is balancing between competing interests, and the need to respect legitimate public choice.

b. Pure Theory:

According to the Allot's structure of legal theories, pure theory consists of a set of ideas explaining the content and meaning of practical theory.<sup>105</sup> Indeed, the practical reasons offered by courts and tribunals regarding diversity, democratic legitimacy, and institutional competence, etc., have all been contextually referred to, as explanations why international courts and tribunals should strike a balance in both vertical and horizontal dimensions. Balancing as pure theory to the doctrine of margin of appreciation presupposes that rights are not absolute<sup>106</sup> otherwise there wouldn't be a need for balancing. The structure of rights as contained in treaties, conventions and national laws clearly depicts their non-absoluteness. Derogations, restrictions, justified limitations are all attestations to the non-absoluteness of rights. As rhetorically captured;

*"Rights are not worded sufficiently precisely to prevent value conflict; nor are legal principles sufficiently clear, autochthonous, and hierarchical to overcome the dependence of human rights adjudication on foundationalist values, and neither can they escape the normative dilemmas and conceptual ambiguities attendant to those foundationalist values."*<sup>107</sup>

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<sup>105</sup> Allott (n 99) 31.

<sup>106</sup> Alan Gewirth though admitted the popularity of 'non-absoluteness of right' provides a criticism to the theory of non-absoluteness of right. See; A Gewirth, 'Are There Any Absolute Rights?' (1981) 31 The Philosophical Quarterly 1, 1-16.

<sup>107</sup> G Beck, 'The Mythology of Human Rights' (2008) 21 Ratio Juris 312, 345.

In understanding the theory of balancing, it needs to be reiterated that both vertical and horizontal balancing of margin of appreciation fall within the overall judicial balancing<sup>108</sup> often described as 'judicial law making'.<sup>109</sup> Without delving into the judicial law making debate, for long however, the notion of declaratory theory of law has been rejected vehemently in judicial parlance.<sup>110</sup> In the balancing (both proportional and vertical) an adjudicator is undoubtedly exerting and engaging in an intellectual creativity in trying to balance competing claims beyond mechanical application of law. Therefore, it needs to be clarified that even in the application of vertical balancing an adjudicator is also engaging in judicial balancing by refraining and exercising deference. This perception is linked to the theory of judicial law making that considers, confined, restricted or even avoided the application of law as equally law-making in the negative sense.<sup>111</sup>

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<sup>108</sup> On judicial balancing generally see; M NOVAK, 'Three Models of Balancing (in Constitutional Review)' (2010) 23 *Ratio Juris* 101., F Schauer, 'Balancing, Subsumption, and the Constraining Role of Legal Text' [2009] University of Virginia Legal Working Paper Series 133., J Bomhoff, 'Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (constitutional) Law' [2008] *Hastings International and Comparative Law Review*, Vol. 31, No. 2, 2008, TICOM Working Paper on Comparative and Transnational Law No. 2008/5.,

<sup>109</sup> A von Bogdandy and I Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers' (2003) 429 *STANFORD LAW REVIEW* 461.

<sup>110</sup> EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press 2005) 25; According to Roscoe Pound '...it was assumed that the function of the judge consisted simply in interpreting an authoritatively given rule...and in mechanically applying the rule so given and interpreted. This assumption has its origin in the stage of the strict law in the attempt to escape from the overdetail on the one hand, and the vague sententiousness on the other hand, which are characteristic of primitive law.' See; Roscoe Pound, *An Introduction to the Philosophy of Law* (The Lawbook Exchange, Ltd 2003) 124-147.

<sup>111</sup> Thomas (n 118) 3 an analogy can also be drawn with 'erroneous non-exercise or minimal exercise of jurisdiction by a competent court or tribunal in a matter it ought to have exercise jurisdiction. Such refusal is often challenged on the ground of use of excess of power.

Indeed, the theory of balancing is never without dissent. While they bear numerous depictions such as formalism versus pragmatism, activism versus restraint, and so on, it suffices here to admit that there exist proponents to balancing and opponents to balancing. The major theoretical arguments are quite difficult to appraise into distinct categories as they overlap. The theoretical arguments of Hart<sup>112</sup> and Dworkin<sup>113</sup> are quite instructive in this regard. In his criticism to positivism particularly, the Hartian conception of principles and discretion,<sup>114</sup> Dworkin argued that principles must be distinguished from rules. Rules operate in 'all or nothing' fashion. Therefore, a purported conflict or tension between rules could be resolved through validity knock-out where one of the rules will invalidate the other. However, principles do not operate in 'all or nothing' fashion, but rather as standards to be observed. Their very nature suggests that they are likely to collide, or generate tension in an interactive setting. In the event of such conflict, as they possess relative 'weight dimension', they could be balanced by ascribing their relative value.

A step further in the crystallisation of inherent balancing dimension<sup>115</sup> of principles is contained in the works of Robert Alexy.<sup>116</sup> Like Hart/Dworkin

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<sup>112</sup> HLA Hart, *The Concept of Law* (Clarendon Law Series), 2nd Ed. (2nd edn, Clarendon Press 1997) 124-147.

<sup>113</sup> Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 14-46.

<sup>114</sup> For an analytical account of Hart/Dworkin debate on discretion see; M Klatt, 'Taking Rights Less Seriously. A Structural Analysis of Judicial Discretion' (2007) 20 Ratio Juris 506, 122.

<sup>115</sup> For Habermas/Alexy debate in the context of balancing in the jurisprudence of ECtHR see; S Greer, '" Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate' (2004) 63 The Cambridge Law Journal 412, 412-434.

debate, Alexy's theory was much refined in the context of responding to Jürgen Habermas.<sup>117</sup> According to Habermas, the whole idea of judicial balancing strip constitutional right off their priority over other claims, as they reduced the rights to irrational balancing, whose outcome is not a product of right/wrong argument, but a mere value judgement. Alexy on the other hand developed a structured theory of constitutional right. The basis of balancing theory starts with distinction between rules and principles. Like Dworkin, to Alexy while rules are norms that must either be obeyed or not, principles on the hand are '*optimization requirements that can be fulfilled to the greatest extent possible given the legal and factual possibilities.*'<sup>118</sup> Following Dworkian 'weight dimension' of principles, in the event of conflict or tension between competing principles, the task is for the courts or tribunals to engage in the exercise of ascribing relative 'weight dimension' through optimisation.

Both Dworkian and Alexy's theorisation of principles as optimization will be used in this research as defining face of the theory of margin of appreciation. Indeed, other propositions made by Alexy include clarifying the application of proportionality and its structured tests of suitability, necessity and proportionality. He largely drew the explanations from the jurisprudence of

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<sup>116</sup> Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2010); R Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 *Ratio Juris* 131, 131-140; R Alexy, 'The Construction of Constitutional Rights' (2010) 4 *Law & Ethics of Human Rights* 2, 2.

<sup>117</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (New edition, Polity Press 1997) 238-257.

<sup>118</sup> Alexy, *A Theory of Constitutional Rights* (n 116) 47.

German constitutional court where proportionality is applied as a balancing tool.

However, balancing as pure theory explaining practical reasons for applying margin of appreciation is in itself short of explaining why certain values should be prioritised over others.

c. Transcendental Theory:

Transcendental theory or theory of theory consists of ideas explaining pure theory and thereby creating a link between structures of ideas and consciousness.<sup>119</sup> It explains both pure and practical theories. This thesis submits that the transcendental explanation of both pure and practical theories of margin of appreciation needs to exist in an unfixed inclination that attracts all in an ideal scenario. This is basically to suit the transcendental environment where ideas ought not to be adjudged. Justice/fairness could offer a transcendental explanation to balancing due to non-absoluteness of rights and 'diversity' 'democracy' and 'competence', all as explanations why courts and tribunals should apply the doctrine of margin of appreciation to balance competing interests. In *Belgian Linguistics Case*, the court caught a glimpse of the transcendental theory as follows:

*"...The Convention therefore implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter."*<sup>120</sup>

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<sup>119</sup> Allot (n 107) 34.

<sup>120</sup> *Belgium v Belgium* A 6 (1968); EHRR 252, (n 95).



Similarly, in *Sporrong and Lonnroth v Sweden*, the court further refers to the transcendental just/fairness as follows:

*“...the court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights...”*<sup>121</sup>

Accordingly, a transcendental justice as the theory of theory, in this context, refers to the attraction or appeal to justice or fairness an international court or tribunal would generally develop in order to settle dispute. Particularly, in disputes that could not be resolved at the level of validity where certain rules could rule-away others. While this genealogy of theoretical basis of margin of appreciation is aimed at providing an explanation why International courts and tribunal deploy the doctrine of margin of appreciation as a balancing tool, a look into the application of the doctrine is hoped to describe how the courts have in practice applied the doctrine.

## **2.4 Application of Margin of Appreciation before International Courts and Tribunals:**

The doctrine of margin of appreciation has been applied mostly in the four major areas of international law, namely, use of force, international economic law, European Community law, and human rights law. Therefore, the relevant case law of ICJ, WTO, ECJ, and regional human rights courts (particularly ECtHR) will be examined as follows.

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<sup>121</sup> *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR 35.

#### a. International Court of Justice (ICJ)

One of the cases in which the Permanent Court of International Justice (PCIJ) had the opportunity to fully apply the doctrine of margin of appreciation was the case of *France v Turkey (The Lotus Case)*<sup>122</sup>. Unfortunately, the matter as formulated by both France and Turkey, pursuant to their special agreement was limited to the issue of jurisdiction of Turkey. The special agreement provides:

*“(1) Has Turkey, contrary to article 15 of the Convention of Lousanne of July 24<sup>th</sup>, 1923, respecting conditions of residence and business and jurisdiction, acted in conflict with the principles of international law – and if so, what principles – by instituting, following the collision which occurred on August 2<sup>nd</sup>, 1926, on the high seas between the French steamer Lotus and the Turkish steamer Boz-Kourt...criminal proceedings in pursuance of Turkish law...”*<sup>123</sup>

While deciding the case in favour of Turkey, the court unequivocally stated that the wide measure of discretion afforded to states by international law is limited in certain cases only by prohibitive rules.<sup>124</sup> Indeed, the lotus case is one of the earliest cases in which the international court categorically recognises the ‘*measure of discretion*’ concept.

On the other hand, the court was constrained not to examine the status of the Turkish penal code, the steps taken by Turkish authorities against the French officer, or the nature of the criminal proceedings, in order to possibly ascertain whether there was a denial of justice or not. As it was apparent in

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<sup>122</sup> S.S. *Lotus (Fr. V. Turk.)*, (n 87).

<sup>123</sup> Ibid para 2.

<sup>124</sup> Ibid para 46.

the case, first, there was an inquiry set up by the Turkish authorities.<sup>125</sup> Secondly, the aim behind arresting the French officer pending trial as stated by the PCIJ was to allow the criminal prosecution to take its normal course.<sup>126</sup> Thirdly, both the French national and his Turkish Counterpart were tried, sentenced and convicted, though the Turkish counterpart to 'a slightly more severe penalty.'<sup>127</sup> Thus, but for the limitation on the jurisdictional competence of the PCIJ, the court could have gone further to examine the proportionality of the steps taken by Turkish authorities.

Similarly, in *Germany v United States (LaGrand)*,<sup>128</sup> two German citizens were tried and sentenced to death by the Arizona Court in the United States. After the execution of one of them, the German authorities instituted an action against the United States before the International Court of Justice alleging violation of the Vienna Convention on Consular Relations of 1963. Judgement was entered in favour of Germany. One of the declarations sought before the court by Germany was a specific court order compelling United States to give assurances that upon recurrence of similar incidence, they will offer effective review and remedies to the victims. The Court held disagreeing with German submission in part as follows:

*"...In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration...This obligation*

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<sup>125</sup> Ibid para 16.

<sup>126</sup> Ibid para 17.

<sup>127</sup> Ibid para 19.

<sup>128</sup> *Germany v United States (La Grand)* ICJ, (n 87).

*can be carried out in various ways. The choice of means must be left to the United States.*"<sup>129</sup>

In *the Islamic Republic of Iran v United States (Oil Platform case)*,<sup>130</sup> United States argued that their attack on the Iranian oil platforms owned and operated by the National Iranian oil company was a measure necessary to protect United States' essential security interest, and therefore should be afforded a measure of discretion. Iran on the other hand, argued that the attack was in violation of its freedom of commerce protected under the Treaty of Amity, Economic Relations And Consular Rights, a bilateral treaty between the two countries. The ICJ decided the case in favour of the Islamic Republic of Iran. The oil platform case was described as a weak case for margin of appreciation in terms of its 'rejection' of the doctrine.<sup>131</sup> I submit, however, a fresh look at the case would reveal otherwise. The main issues the court was confronted with were allegations made by Iran of violation of article x which provides for freedom of commerce, and the purported justification of same pursuant to article xx which provides for non precluded measures of the same treaty as argued by the United States. The court in its analysis deliberately<sup>132</sup> started with a reverse approach by looking at the purported defence offered by United States pursuant to article xx. The approach is typical of margin of appreciation analysis when a state measure is complained of. The essence is to define the zone of legality by applying legitimacy test to ascertain the

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<sup>129</sup> Ibid para 125.

<sup>130</sup> *Oil platforms (Islamic Republic of Iran v. United States of America)*, Judgement, (n 87) 161.

<sup>131</sup> Shany (n 71).

<sup>132</sup> *Oil platforms (Islamic Republic of Iran v. United States of America)*, Judgement, (n 87) [para 37].

‘superficial’ legality of the measure in question. Indeed, the court found that the measure in question was the use of armed force by the United States the basis of which is prohibition under international law.<sup>133</sup> This begs for justification on the party relying on it. Secondly, when use of force is resorted to, as self-defence under international law, it must be conditional upon ‘the state concerned having been the victim of an armed attack’.<sup>134</sup> Thirdly, in such a situation, the burden is on the United States to show that the oil platforms ‘were a legitimate military target open to attack in the exercise of self-defence’.<sup>135</sup> None of the above was discharged by the United States to the satisfaction of the court. Therefore, it could be understood from the judgement (though remotely) that the cumulative effect of resort to use of force by US, and the failure to satisfy the condition precedent for resorting to the use of force under international law clearly severed the basis upon which good faith could be extrapolated into the Non Precluded Measure (NPM) clause in the treaty pursuant to which US sought the margin to be applied. The following passage in the judgement could be understood in that context:

*“...The Court does not however have to decide whether the United States interpretation of Article xx, paragraph 1 (d), on this point is correct, since the requirement of International law that measures taken avowedly in self – defence must have been necessary for that purpose is strict and objective, leaving no room for any ‘measure of discretion’.”*<sup>136</sup>

Similarly, the dissenting opinion of Judge Elaraby and the separate opinion of Judge Koojimans seem to confirm the above understanding. Elaraby in his

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<sup>133</sup> Ibid para 43–44.

<sup>134</sup> Ibid para 57.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid para 73.

dissenting opinion identifies use of force as the determinant issue in the case. While stressing the importance of the principle of prohibition of use of force under International law pursuant to Article 2 (4) of the United Nations Charter, he concluded that the principle reflects the rule of 'jus cogens' from which no derogation is permitted. Accordingly, 'A clause in a commercial treaty cannot possibly be invoked to justify the use of force.'<sup>137</sup> Koojimans<sup>138</sup> also in his separate opinion alluded to the impact of use of force in the case as it relates to the issue of measure of discretion. He conceded to the view that use of force is subject to strict legal norms due to the peremptory nature of its prohibition which explains the limitation to applying same in favour of United States in the case.

Therefore, it could be argued that the jurisprudence of PCIJ, and ICJ on margin of appreciation even after Oil platform's case wasn't as bleak as it was often described. In fact, the jurisprudence set out the outer limits for the operation of the doctrine in international adjudication. As rightly pointed out by Koojimans and Elaraby, the test for 'jus cogens' and use of force are strict, which resonates well with the majority position.

#### **b. World Trade Organisation (WTO Law):**

In the context of international economic law, the relevance of margin of appreciation goes into the framework of the WTO jurisprudence. The WTO

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<sup>137</sup> *Oil platforms (Islamic Republic of Iran v United States of America)*, Dissenting Opinion, (ICJ) 134.

<sup>138</sup> *Oil platforms (Islamic Republic of Iran v United States of America)*, Dissenting, (ICJ) 103.

jurisprudence on standards of review<sup>139</sup> especially as developed by the Appellate Body provides a transposable platform to margin of appreciation due to the affinity and functional relevance between the two. The core concern in WTO standards of review is balancing between the relinquished authority by the Contracting Parties to the WTO jurisdiction and the retained authority by the states on one hand, and the need to balance the competing interests in the claims before the WTO judicial bodies.<sup>140</sup> This concern is analogous with the vertical and horizontal elements of balancing in the application of margin of appreciation.

Article 11 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) arguably set out a uniform approach to the generality of judicial reviews to be undertaken by WTO judicial bodies. The article provides as follows:

*"A panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."*<sup>141</sup>

While article 11 DSU provides for a general charter, namely, 'objective assessment'<sup>142</sup> for undertaking judicial review exercise by the WTO judicial

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<sup>139</sup> On standard of review in WTO see: Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (OUP Oxford 2003). Guzman (n 69).

<sup>140</sup> Guzman (n 69) 7.

<sup>141</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) 1869 U.N.T.S. 401; 33 ILM 1226 (1994) (n 90).

<sup>142</sup> According to the Appellate Body in *US-Cotton Yarn*, para 476, WT/DS192/AB/R the review pursuant to Article 11 refers to:

*"...whether the competent authority has evaluated all relevant factors;...whether the competent authority has examined all the pertinent facts ...whether an adequate explanation has been provided as to how those facts support the determination;...whether the competent*

bodies, the structure of various agreements and the nature of contested values therein cannot be totally disregarded. Those specific agreements could hinder or even militate against the general approach set out by article 11 DSU. As the Appellate Body held in *EC – Hormones* case, while stressing the relevance of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) as follows:

*“The standard of review appropriately applicable in proceedings under the SPS Agreement of course, must reflect the balance established in that Agreement between jurisdictional competences conceded by the members to the WTO and the jurisdictional competences retained by the members for themselves. To adopt a standard of review not clearly rooted in the text of the SPS Agreement itself, may well amount to changing that finely drawn balance; and neither a panel nor the Appellate Body is authorized to do that.”*<sup>143</sup>

A cursory analysis of the following specific agreements that either contain specific judicial review provisions or provide for justified exceptions to WTO law is pertinent in order to reveal the nature of judicial review in the WTO.<sup>144</sup>

These agreements are:

- i. Anti-dumping Agreement;
- ii. Technical Barriers to Trade (TBT) Agreements;

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*authority’s explanation addresses fully the nature and complexities of the data and responds to other plausible interpretation of the data. However, panels must not conduct a de novo review of the evidence nor substitute their judgment for that of the competent authority.”*

<sup>143</sup> *Measures Concerning Meat and Meat Products (Hormones)*, para 115, WT/DS/26/AB/R, WT/DS48/AB/R (1998) Available at <http://www.worldtradelaw.net/reports/wtoab/ec-hormones%28ab%29.pdf>

<sup>144</sup> Proportionality stood out in many judicial reviews under WTO particularly in the context of necessity test, though received with mixed reactions. For positive response See; M Andenas and S Zleptnig, ‘Proportionality: WTO Law in Comparative Perspective’ (2007) 42 *Texas International Law Journal* 370. For a view point rejecting the relevance of proportionality in WTO Law, See; A Desmedt, ‘Proportionality in WTO Law’ (2001) 4 *Journal of International Economic Law* 441. J Neumann and E Turk, ‘Necessity Revisited: Proportionality in World Trade Organization Law after Korea-Beef, EC-Asbestos and EC-Sardines’ (2003) 37 *Journal of World Trade* 199. See generally on ‘necessity’ test under WTO, DH Regan, ‘The Meaning of “necessary” in GATT Article XX and GATS Article XIV: The Myth of Cost-benefit Balancing’ (2007) 6 *World Trade Review* 347.



iii. Sanitary and Phytosanitary (SPS) Agreements;

iv. General exceptions (GATT & GATS);

i. Anti-dumping Agreement:

The essence of anti-dumping agreement is to provide justification for states to adopt measures that could otherwise contravene WTO law for the purpose of protecting their domestic industries against harm from dumping.<sup>145</sup> Pursuant to the General Agreement on Tariffs and Trade (GATT) 1994 and Anti-dumping Agreement, states are free to impose anti-dumping measures provided they comply with WTO law. The anti-dumping framework reflects balancing between trade liberalisation and promotion with public interest dimension of protecting domestic industries against harmful trade practices. The nature of anti-dumping disputes involves the determination of consistency of the anti-dumping measure embarked upon by a WTO member state with the Anti-dumping Agreement<sup>146</sup> and GATT 1994.<sup>147</sup> The framework for adjudicating anti-dumping measures is contained in Article 17.6 which provides as follows:

- (i) *In its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overtuned;*

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<sup>145</sup> Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2nd edn, Cambridge University Press 2008) 508.

<sup>146</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) 1994, available at [http://www.wto.org/english/docs\\_e/legal\\_e/19-adp.pdf](http://www.wto.org/english/docs_e/legal_e/19-adp.pdf)

<sup>147</sup> GATT article IV.

- (ii) *The panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.*<sup>148</sup>

Flowing from article 17.6, the mandate of WTO panel is not to engage in a fresh evaluation of the measure adopted by the member states, but to ensure the measure is objective and unbiased. This approach clearly underscores the deference dimension of margin of appreciation where, legitimacy of measure is reviewed superficially without undue intrusion into domestic regulatory and administrative space of states. More importantly, the article provides for explicit deference to the states when their evaluation of facts and their interpretation of law could be accommodated, notwithstanding other alternative conclusions and interpretations to the contrary. In *US-Cotton Yarn* the appellate body after defining the parameters of article 17.6 remarked;

*"...panels must not conduct a denovo review of the evidence nor substitute their judgement for that of the competent authority."*<sup>149</sup>

ii. Technical Barriers to Trade (TBT) Agreements:

Technical regulations, standards and conformity procedures under TBT Agreement are aimed at balancing between domestic regulations for the protection of quality of products, protection of life, health and environment on one hand, and prevention of disguising same as a protectionist tool in the

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<sup>148</sup> GATT Article 17.6 Anti-dumping Agreement

<sup>149</sup> *US-Cotton Yarn* WT/DS192/AB/R (2001) PARA 74, available at <http://www.worldtradelaw.net/reports/wtoab/us-yarn%28ab%29.pdf>

context of WTO jurisprudence.<sup>150</sup> Thus, the agreement seeks to ensure that, while domestic regulations, standards, and conformity assessment procedures could be a means of protecting product and their consumers, they do not however constitute trade barriers. The agreement provides, among other things, that products be accorded the *most favoured nation*, and *national* treatments, the fundamental norms of the WTO system. Similarly, international standards must guide the domestic technical regulations. The general framework for TBT Agreements undoubtedly calls for balancing of contested values contained in the agreement. The preamble to the agreement captures the balancing dilemma as follows:

*"...Recognising that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, or of the environment, or for the protection of deceptive practices, at the level it considers appropriate, Subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination...or a disguised restriction on international trade..."*

Clearly, the determination of TBT measures and the level of protection are relinquished to domestic regulatory space.<sup>151</sup> The agreement further provides for a list of legitimate objectives pursuant to which states could apply technical regulations. These objectives include, national security, prevention of deceptive practices, protection of human health and safety, animal and plant life or health, including environmental objectives. In addition to the non-exhaustiveness of the list of legitimate policy objectives in which technical regulations may be set, the liberty accorded to states to determine

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<sup>150</sup> Bossche (n 145) 806-832.

<sup>151</sup> Ibid 805.

the legitimate policy objectives embraces deference to states by recognising their jurisdictional competence similar to vertical balancing under margin of appreciation.

Similarly, while prescribing to the member states not to adopt technical regulations with a view to creating obstacles to international trade, provides for a necessity test that “...technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.”<sup>152</sup> Indeed, the determination of necessity reflects the proportionality balancing, since the WTO panels would have to examine upon complaint whether the adopted legitimate objectives have complied with the necessity test enshrined in the TBT Agreement. In *EC – Asbestos* the Appellate Body confirmed both the deferential and proportionality balancing as follows:

*“...it is undisputed that WTO members have the right to determine the level of protection of health that they consider appropriate in a given situation....it seems to us perfectly legitimate for a member to seek to halt the spread of a highly risky product while allowing the use of a less risky product in its place.”*<sup>153</sup>

Indeed, the Appellate Body went further to examine whether there are other alternative measures available (pursuant to necessity test), before concluding

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<sup>152</sup> Article 2.2 TBT Agreement

<sup>153</sup> European Communities - Measures Affecting Asbestos or Products Containing Asbestos, para 168, WT/DS135/AB/R, (2001) Available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/135abr\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/135abr_e.pdf)

that “France could not reasonably be expected to employ any measure if that measure would involve a continuation of the very risk that the Decree seeks to “halt”.”<sup>154</sup>

iii. SPS Agreements:

Sanitary and Phytosanitary agreements, like TBT they are aimed at balancing between protecting public health generally, with particular reference to human beings, animals, plants and environment on one hand, and avoiding trade protectionism on the other hand. The structure of the SPS Agreement unequivocally confirms the sovereign right of states to determine and implement SPS measures.<sup>155</sup> In this regard, Article 2 (i) and (ii) provides;

*“Members have the right to take sanitary and Phytosanitary measures necessary for the protection of human, animal or plant life or health...”*

*“Members shall ensure that any sanitary or Phytosanitary measure is applied only to the extent necessary...”*

Like in TBT agreements, the explicit recognition of the sovereign right of states to take SPS measures reflects the vertical balancing which defers to states to decide on the legitimate aim to be pursued. Similarly, the proportionality balancing is also reflected in the necessity test which seeks to ensure SPS measures taken by states are necessary to the purpose sought to be achieved, thus, reflecting means-end relationship.

iv. General exceptions (GATT & GATS);

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<sup>154</sup> Ibid., para 174

<sup>155</sup> On the prerogative of states to set levels of protection See; M Ming Du, ‘Autonomy in Setting Appropriate Level of Protection under the WTO Law: Rhetoric or Reality?’ (2010) 13 Journal of International Economic Law 1077.

Both GATT and the General Agreement on Trade in Services (GATS) provides for general exceptions pursuant to which states can adopt and enforce measures otherwise inconsistent with their WTO substantive obligations.<sup>156</sup> These exceptions include measures for the protection of human, animal or plant, life or health, public morals, and national treasures. These exceptions enable states to discharge their domestic obligations in terms of fulfilling non-trade, albeit societal values. In resorting to such exceptions, states must ensure their adopted measures are not arbitrary, discriminatory or trade restrictions in disguise.<sup>157</sup> The structure of the exceptions provides a platform for balancing between trade values and non-trade values. In addition to the general exceptions, GATT, GATS and TRIPS<sup>158</sup> provide for essential security exceptions.<sup>159</sup> The essential security exceptions enable states to take security measures either for domestic or international security notwithstanding their trade restrictive nature. Similarly, states are free to adopt exceptional measures otherwise discriminatory to other WTO member states in furtherance of economic integration agreements.<sup>160</sup> This exception for economic integration agreements under WTO law is in deference to the proven value of such agreements in terms of facilitating trade and reciprocal favourable trade treatments among states that adhered to them<sup>161</sup>. GATT and GATS provide for another trade restrictive measure to safeguard balance of

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<sup>156</sup> General Agreement on Tariffs and Trade article XX, and General Agreement on Trade in Services article XIV.

<sup>157</sup> *ibid*

<sup>158</sup> Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) available at [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm8\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm8_e.htm)

<sup>159</sup> GATT article XXI, GATS article XIV, and TRIPS article 73.

<sup>160</sup> GATT article XXIV, and GATS article V.

<sup>161</sup> Bossche (n 145) 696.

payments of member states.<sup>162</sup> The balance of payment exception is aimed at balancing between trade liberalisation and safeguarding external financial position and balance of payments of states that decides to invoke such measures. More importantly, the measure targets developing countries as it explicitly recognises their need for 'economic development'.<sup>163</sup> WTO law further provides for additional exception allowing states to adopt and implement emergency safeguard measures for the protection of domestic industries where such industries are injured or likely to be injured by over importation of like or competitive products.<sup>164</sup> This form of measure like all the previous exceptions is based on the recognition of balancing between trade liberalisation and economic reality of member states.

In summary, the framework of WTO law intersects the need for balancing of contested values between trade and non-trade values. WTO law further incorporates both vertical and horizontal balancing in the considered agreements. The freedom of states to determine the exceptional measures and the appropriate level of protection at the domestic regulatory and administrative stage reflect the vertical balancing of margin of appreciation where the 'legality zone' of states is demarcated and respected. In addition to that, the authority of the panels and appellate bodies to examine and review

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<sup>162</sup> GATT article XII, and GATS article XII.

<sup>163</sup> GATT article XVIII.

<sup>164</sup> GATT article XIX. See also Agreement on Safeguards available at [http://www.wto.org/english/tratop\\_e/safeg\\_e/safeint.htm](http://www.wto.org/english/tratop_e/safeg_e/safeint.htm)

the ‘necessity’ ‘reasonability’ ‘least restrictiveness’ of the measures demonstrate the horizontal balancing of margin of appreciation.

### **c. European Union Law**

In the context of European law, the jurisprudence of the European Court of Justice (ECJ) recognises the functional elements of margin of appreciation. First, proportionality analysis is the hallmark in the judicial review tools in the jurisprudence of ECJ.<sup>165</sup> Secondly, the notion of ‘deferential review’ is a popular device used by European court of justice in its proportionality analysis to defer to the choices made by European commission or the member states.<sup>166</sup> Indeed, unlike in the WTO law, the resort to the functional elements of margin of appreciation in the ECJ’s jurisprudence has been considered as recourse to ‘unwritten law’.<sup>167</sup> Of course, this can be explained from the foundational basis pursuant to which the court engages in its review analysis. ECJ’s adjudicative tools are mostly recognised as part of general principles of the European Union legal order having been drawn from various domestic legal systems of the member states. However, much prior to the current structure of European Union law, one of the founding European Union law

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<sup>165</sup> Jürgen Schwarze and Office for Official Publications of the European Communities, *European Administrative Law* (Office for Official Publications of the European Communities 2006) 678–866.

<sup>166</sup> Richard Gordon, *EC Law in Judicial Review* (Oxford University Press 2007) 292–297.

<sup>167</sup> On the source of proportionality under EU law. See Jürgen Schwarze, *supra*, p. 710-716



treaties, the Treaty of Paris of 1951<sup>168</sup> provides for judicial review analogous to the doctrine of margin of appreciation. Article 33 (1) provides:

*“...the court may not review the conclusions of the High Authority (European Commission), drawn from economic facts and circumstances, which formed the basis of such decisions or recommendations, except where the High Authority (European Commission) is alleged to have abused its powers or to have clearly misinterpreted the provisions of the treaty or of a rule of law relating to its application...”*

Currently, the traces of margin of appreciation in ECJ are embedded in the framework pursuant to which European Union law is structured. The supreme treaty, namely, the treaty of Lisbon<sup>169</sup> explicitly provides for respect to the principles of subsidiarity and proportionality.<sup>170</sup> Similarly, the protocol on the application of subsidiarity and proportionality further provides for both substantive and procedural steps towards the application of subsidiarity and proportionality principles.<sup>171</sup> More importantly, both the treaty and the protocol empower the ECJ with adjudicative powers to determine violations of subsidiarity and proportionality within the EU legal order. Thus, it can be argued that the two principles permeate the entire European Union law

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<sup>168</sup> Paris Treaty Establishing the European Coal and Steel Community, 18 April 1951, 261 U.N.T.S. 140. Expired 23 July 2002. Information at [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/treaties\\_ecsc\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_ecsc_en.htm)

<sup>169</sup> European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, 2007/c306/01, available at <http://www.unhcr.org/refworld/docid/476258d32.html> [last accessed 6 October 2011].

<sup>170</sup> Ibid, Treaty of Lisbon Article 5.

<sup>171</sup> Lisbon Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality, available at see <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/protocols-annexed-to-the-treaties/657-protocol-on-the-application-of-the-principles-of-subsidiarity-and-proportionality.html> (last accessed 6 October 2011)

framework. In this regard article 5 (1) of the Lisbon treaty is quite instructive.

It provides as follows:

*“The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.”*

Therefore, the combine structure of the Lisbon treaty and the protocols annexed to the treaty embraces balancing in both its vertical and horizontal dimensions. Vertical balancing within EU legal order can be linked to, and understood from, the principle of subsidiarity that characterises the European Union law. The principle requires that EU institutions should not overstep their conferred competence, and while performing their functions, diversity and local circumstances shall be reflected where appropriate. While subsidiarity is not strictly similar with margin of appreciation, however, it provides a basis where vertical balancing dimension of margin of appreciation could be discerned in the jurisprudence of the ECJ. Indeed, many cases before the EU courts involve matters regarding the determination of competence, and/or policy implementation, between the member states and the Union, particularly where both EU and member states enjoined dual competences, or matters regarding competition where private companies appealed against administrative decisions such as mergers. In *Germany v*

*Commission*,<sup>172</sup> the European Commission annulled the German national allocation plan in respect of greenhouse gas emission on the ground that it contravenes directive 2003/87/ec. Germany, however, successfully challenged the annulment decision by the commission on the ground that the commission had overstepped its review power and encroached upon the freedom of Germany. In its judgement regarding competence between member states and the commission, and the extent of judicial review, the court concluded that both Germany and the Commission are entitled to some form of margin of appreciation.<sup>173</sup> The court further delineated the scope of its review against the decision of the commission as follows:

*"...the court of first instance cannot take the place of the Commission where later must carry out complex economic and ecological assessments in this context....the court is obliged to confine itself to verifying that the measure in question is not vitiated by a manifest error or a misuse of powers, that the competent authority did not clearly exceed the bounds of its discretion..."*<sup>174</sup>

Similarly, horizontal balancing is also contained in the EU legal order in the like manner vertical balancing is reflected. Both Article 5 of the Lisbon treaty and the protocol for the application of subsidiarity and proportionality provides for this form of balancing. In this respect, article 5 (4) of the treaty provides:

*"Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the treaties. The institutions of the Union shall apply the principle of proportionality as laid*

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<sup>172</sup> Case T-374/04 Germany v Commission (2007) E.C.R. II-4431 Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004A0374:EN:HTML> (last accessed 6 October 2011)

<sup>173</sup> Germany v Commission Para 77

<sup>174</sup>Supra, Para 81

*down in the protocol on the application of the principles of subsidiarity and proportionality.”*

Indeed, horizontal balancing as applied by ECJ in summary denotes that the ‘means’ deployed to attain a given ‘end’ should not exceed what is necessary to attain the end. The adjudicatory nature of proportionality balancing within EU law entails balancing between public need for a given measure and the effect the measure could have on a right holder. The court developed the multi-layered expressions of ‘necessity’ ‘suitability’ ‘proportionality’ and ‘manifestly inappropriate’ to ensure a structured balancing exercise and coordinate the test regarding means-end relationship. In *Agrana Zucker GmbH v Bundesminister für Land-und forstwirtschaft, Umwelt und Wasserwirtschaft*,<sup>175</sup> Agrana Zucker challenged the regulatory measure that restructures sugar industry by raising charges against sugar producers and tasking them in particular, to pay EUR 15,908,561.77 into the temporary restructuring scheme. The ECJ while analysing the regulatory measure in issue, summarised the current contours and application of proportionality balancing. According to the court, the contours of proportionality as a general principle of EU Law denotes that measures must not exceed what is appropriate and necessary for attaining their legitimate objectives, and disadvantages as a result of the

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<sup>175</sup> Case C – 309/10 *Agrana Zucker GmbH v Bundesminister für Land-und forstwirtschaft, Umwelt und Wasserwirtschaft* (2011) E.C.R. 00000 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010J0309:EN:NOT> (last accessed 6 November 2011).

measure must not be disproportionate to the aims. In the event of several appropriate choices, resort must be made to the least onerous.<sup>176</sup>

However, in the implementation of horizontal balancing, a distinction must be made between areas where public bodies enjoy a wide measure of discretion and areas where they do not. This is important because, it appears in the ECJ case law, proportionality is the leading judicial review tool that encompasses some traces of deference.<sup>177</sup> As in *Agrana Zucker*, the ECJ having combined both vertical and horizontal elements concluded that in EU law, the EU legislature enjoys wide discretionary margin in matters of common agricultural policy, and the relevant proportionality test is 'manifest inappropriateness'. The court held as follows:

*"...what must be ascertained is not whether the measure adopted by the legislature was the only measure possible or the best measure possible, but whether it was manifestly inappropriate."*<sup>178</sup>

Accordingly, the jurisprudence of EU law as adjudicated by ECJ undoubtedly embraces some form of margin of appreciation. More importantly, the jurisprudence recognises the balancing function of the doctrine and the proportionality and deference elements therein. Indeed, the jurisprudence of the ECJ is far from being totally uniform due to the distinctive nature of the cases and the diversity of values the court is grappling with in its adjudicatory role. As the ECJ applies the doctrine in as diverse areas as free

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<sup>176</sup> *Agrana Zucker* para 42

<sup>177</sup> J Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 *European Law Journal* 80, 90.

<sup>178</sup> *Agrana Zucker* para 44.

movement of persons and goods, freedom of establishment and services, agricultural market, competition etc, it is expected that factors surrounding the relevant measures and legislations are likely to influence the application of the doctrine.

d. Regional Human rights Courts:

As earlier stated, the doctrine of margin of appreciation has been largely developed in the context of human rights adjudication. The nature of human rights adjudication in most cases involves the determination of whether human rights should always trump or they should pave way to some justified exceptions. The dilemma between upholding guaranteed right and allowing derogatory and restrictive measures, could be viewed as what steered the current role of margin of appreciation in human rights adjudication. Regional Human rights adjudications are treaty based. All the individual rights are contained in the relevant regional conventions and their protocols. These Conventions are:

- a. The European Convention for the Protection of Human Rights and Fundamental freedoms.<sup>179</sup>
- b. American Convention on human rights.<sup>180</sup>
- c. African Charter on Human and peoples' rights.<sup>181</sup>

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<sup>179</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, (ECHR), 4 November, 1950 Europe. T.S. No. 5; 213 Available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CM=8&DF=06/10/2011&CL=ENG>

<sup>180</sup> Organization of American States, American Convention on Human Rights, (ACHR), "pact of San Jose" Costa Rica, 22 November 1969, available at <http://www.oas.org/juridico/english/treaties/b-32.html>

i. European Court of Human Rights (ECtHR):

As earlier noted the doctrine of margin of appreciation is largely and substantially developed by the jurisprudence of ECtHR. Under the European Convention, while contracting states are under obligation to secure the rights and freedoms enshrined in the convention for everyone in their respective jurisdictions,<sup>182</sup> the European court of human rights is empowered to ensure observance of the commitments by the contracting states. Therefore the application of the doctrine can be said to emanate from the powers of the court to ensure compliance with the standard of rights and freedoms contained in the Convention, and the need to delineate the extent to which the Court would scrutinise domestic measures.<sup>183</sup>

The doctrine of margin of appreciation has been developed by the ECtHR primarily to enable the Court balance competing interests that appear inherent in the European Convention on Human Rights. The Convention contains provisions dealing with fundamental rights, freedom of expression, personal liberty, protection of property etc.<sup>184</sup> The Convention also provides for restriction and derogation from satisfying those rights and freedoms due to circumstances outlined in the limitation clauses.<sup>185</sup> Such limitations include

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<sup>181</sup> Organization of African Unity, African Charter on Human and Peoples' Rights (ACHPR), ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at [http://www.africa-union.org/rule\\_prot/africancourt-humanrights.pdf](http://www.africa-union.org/rule_prot/africancourt-humanrights.pdf)

<sup>182</sup> ECHR Ibid, Article 1.

<sup>183</sup> QC and QC (n 79) 35.

<sup>184</sup> ECHR Ibid, Articles 2-15.

<sup>185</sup> ECHR Ibid, Articles 8-11 and 15-18.

limitations provided by law, measures necessary in a democratic society, protection of public safety, public order, public health and morals, freedom of others, etc. The reconciliation between realisations of the enshrined rights with the legitimate restrictions is what provides a nurturing ground where the doctrine of margin of appreciation was developed.

In its application of the doctrine, the court balances between its judicial autonomy and the regulatory/administrative autonomy of the member states on one hand (vertical), and also balances between the competing interests among the parties on the other hand (horizontal). This approach adopted by the ECtHR of engaging in dual balancing was the premise upon which the functional elements of margin of appreciation were deduced and based. Regarding vertical balancing the court consistently maintained that national authorities are better placed to assess domestic issues than an international body.<sup>186</sup> Similarly, in the horizontal balancing the court repeatedly maintained that margin of appreciation enables the court to examine further whether public measures are 'proportionate'. Because the application of margin of appreciation goes simultaneously with European supervision by ensuring that national authorities based their measures on 'acceptable assessments'.<sup>187</sup>

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<sup>186</sup> *Handyside v United Kingdom* (1976) 1EHRR 737

<sup>187</sup> *Case of Vogt v Germany* (1995) para 52 available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695889&portal=hbk m&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (last accessed 6 October 2011)



The doctrine is applied by the court in three broad situations. First, in the context of public emergency the Convention provides for derogation.<sup>188</sup> The application of margin of appreciation in this context connotes balancing between the public values to be protected and the guaranteed rights threatened or likely to be threatened by the derogation.<sup>189</sup> In **Aksoy v Turkey**<sup>190</sup> the ECtHR while applying the doctrine in the context of derogation stated that, it falls within the responsibility of contracting states to determine the threat justifying the derogation. According to the court, national authorities are better placed in such an exercise than an international judge. Secondly, the court has applied the doctrine of margin of appreciation in the context of limitations 'necessary in a democratic society'.<sup>191</sup> This is where the application of the doctrine is much more divergent. <sup>192</sup> In **Hatton and Ors v United Kingdom**<sup>193</sup> the applicant alleged violation of article 8 which provides for respect to family and privacy at home due to noisy night flights at Heathrow airport. The Grand Chamber while applying the doctrine and rejecting the claim concluded that the overall economic well – being of the country here (covered by article 8 (2)) outweigh the individual right sought to

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<sup>188</sup> Article 15 ECHR

<sup>189</sup> Pieter Van Dijk and others, *Theory and Practice of the European Convention on Human Rights* (4th Revised edition, Intersentia Publishers 2006) 1055.

<sup>190</sup> *Aksoy v Turkey* (1997) 23 EHRR 553

<sup>191</sup> Article 8-11 ECHR

<sup>192</sup> As a commentator remarked, "the court here is dealing with different rights, different claims in respect of the same right, by applicants in different situations, and with different justifications advanced by states at different times, such variation is inevitable..." See; JG Merrills, *The Development of International Law by the European Court of Human Rights* (New ed of 2 Revised ed, Manchester University Press Melland Schill Studies 1995) 144.

<sup>193</sup> Application No. 36022/97 Case of Hatton and Others v United Kingdom (2003) Available at <http://www.ecolex.org/server2.php/libcat/docs/COU/Full/En/COU-157043.pdf>

be protected by article 8 (1).<sup>194</sup> The third instance where the doctrine of margin of appreciation is applied by ECtHR is pursuant to 'Public interest exception'.<sup>195</sup> Public interest exceptions had been generally interpreted by the Court to attract wider margin of appreciation.<sup>196</sup> In **James v United Kingdom** the court provides a justification why such margin should be wide.

*"...The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgement as to what is 'in the public interest' unless that judgement be manifestly without reasonable foundation."*<sup>197</sup>

Regrettably however, the application of the doctrine by the court was never consistent. While acknowledging this problem, in **Hatton v United Kingdom** the court recognises two conflicting approaches to the application of margin of appreciation as follows:

*"...on the one hand the government claim a wide margin on the ground that the case concerns matters of general policy, and, on the other hand, the applicant's claim that...the margin is narrow...This conflict of views on the margin of appreciation can be resolved only by reference to the context of a particular case"*<sup>198</sup>

Flowing from **Hatton**, it appears there is no 'one cap fit all' definition or application of the doctrine that could apply in all conceivable scenarios. In furtherance to the relevance of context in the application of margin of appreciation, **Zehentner v Austria** is quite instructive. The court explained

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<sup>194</sup> Ibid., Para 120

<sup>195</sup> Article 1 of Protocol No. 1 to the ECHR

<sup>196</sup> *Handyside v United Kingdom* (1976) 1EHRR para 62, *Mellacher v Austria* (1990) 12 EHRR para 53.

<sup>197</sup> *James and Ors v United Kingdom* (1986) 8 EHRR para 46

<sup>198</sup> *Hatton And Ors v United Kingdom* (supra) para 103

further why the inconsistent formulation of the doctrine. While margin of appreciation must be accorded to national authorities as they are better placed and have continuous contact with the vital forces in their countries, the court added;

*“This margin will vary according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions. The margin will tend to be narrower where the right at stake is crucial to the individual’s effective enjoyment of intimate or key rights. Where general social and economic policy considerations have arisen in the context of Article 8, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant”<sup>199</sup>*

Therefore, margin of appreciation as context-dependent appear to defy any attempt to generalise its application. In view of these diverse approaches adopted by the Court due to the peculiar nature of the exceptions provided under the Convention, cases of margin of appreciation pursuant to public interest exception which exhibit, tension with property rights and legitimate expectations could be clustered so as to discern common principles applied by the ECtHR.

## ii. Inter-American Court/Commission

The Inter-American system of Human rights like European human rights system consist of fundamental rights such as right to life, privacy, right to liberty, right to property, etc., which states are obliged to protect pursuant to the American Convention on Human Rights. Similarly, the Convention like

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<sup>199</sup> *Case of Zehentner v Austria* [2009] ECtHR Application no. 20082/02, 52 2011 EHRR 22 [57].

many human rights instruments contain provisions for justified restriction and derogation from the rights. Such exceptions include necessary measures for public security, public health, morality, right of others, etc. While mere provision for the restrictive and derogatory measures is a reflection towards balancing between competing interests, hardly could an argument be sustained that either the Court or the Commission has fully incorporated the doctrine as part of their routine adjudication tools. As the president of the Commission rightly remarked in this context:

*“...The Inter-American institutions have (deliberately) never imported the European notion of the margin of appreciation, but nevertheless I believe that we will increasingly find ourselves in need of some functional equivalents to it, in order to manage diversity with the same measured skill...”<sup>200</sup>*

However, notwithstanding the above caveat, the jurisprudence of the Court and the Commission has shown not only traces of the doctrine, but I submit application of the doctrine in some respect. In **Walter Humberto Vasquez Vejarano v Peru** <sup>201</sup> the commission unequivocally confirms that ‘margin of appreciation goes hand in hand with Inter-American supervision’. Similarly, in **Advisory opinion on the proposed amendments to the naturalisation provision of the Constitution of Costa-Rica**<sup>202</sup> The court also confirms its recognition of the margin of appreciation accorded to them by the Convention

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<sup>200</sup> Paolo Carozza, Fifty Years of the European Court of Human Rights viewed by its Fellow International Courts (2009). Available at [http://www.echr.coe.int/NR/rdonlyres/3B662702-FFDB-4187-AAC5-6B926725DF35/0/30012009PresidentCarozzaSeminar\\_eng\\_.pdf](http://www.echr.coe.int/NR/rdonlyres/3B662702-FFDB-4187-AAC5-6B926725DF35/0/30012009PresidentCarozzaSeminar_eng_.pdf)

<sup>201</sup>Case No. 11.66 Walter Humberto Vasquez Vejarano v Peru (1999) para 55 available at <http://www1.umn.edu/humanrts/cases/48-00.html>

<sup>202</sup> Proposed amendments to the naturalisation provision of the Constitution of Costa-Rica, Advisory opinion OC-4/84, (1984) Inter-Am. Ct. H.R. para 62 at [http://www1.umn.edu/humanrts/iachr/b\\_11\\_4d.htm](http://www1.umn.edu/humanrts/iachr/b_11_4d.htm)

‘The Court is fully mindful of the margin of appreciation which is reserved to states...’.

Moreover, a typical reflection of vertical balancing and positive recognition of margin of appreciation was in **Rios Montt v Guatemala**.<sup>203</sup> The applicant a retired military officer and former head of the Guatemalan government, alleged violation of his right to be elected as Guatemalan president pursuant to article 23 of the Convention. Guatemalan authorities on the other hand, argued that the refusal to allow Mr Montt to contest was pursuant to article 186 of the Guatemalan Constitution, which prohibits leaders of coup d’etat etc., from contesting an election. The Commission found in favour of the Guatemalan Government on the ground that the refusal to allow Mr Montt is a democratic choice made by the Guatemalan people as enshrined in their constitution and ‘that it was necessary to maintain such grounds’.<sup>204</sup> The commission stated that:

*“The commission considers that the context of Guatemalan and International Constitutional law in which this condition of ineligibility is placed is the appropriate dimension for analysis of the applicability of the Convention in general...and from which the margin of appreciation allowed by international law can emerge.”*<sup>205</sup>

Similarly, the application of proportionality balancing, though described as ‘rudimentary’<sup>206</sup> is quite prevalent in the inter-American jurisprudence of

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<sup>203</sup> Case No.10.804 Rios Montt v Guatemala (1993) at <http://wfrt.net/humanrts/cases/30%5E93gua.pdf> (last accessed 6 October 2011)

<sup>204</sup> Ibid, para 38

<sup>205</sup> Ibid, para 24

<sup>206</sup> Arai-Takahashi (n 78) 187.

necessity and exceptions to private rights in balancing competing interests. Article 30 of the IACHR is quite instructive here, as it provides a uniform test of restriction which applies to the entire Convention in addition to the peculiar restrictions appended to individual provisions. The article provides as follows:

*“The restrictions that pursuant to this Convention may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.”*<sup>207</sup>

As a commentator argued here, article 30 differentiates IACHR with other human rights Conventions as they do not contain such a general restriction provision.<sup>208</sup> The jurisprudence of restrictions under the Convention as developed by the Court pursuant to article 30 requires satisfaction of the following conditions:<sup>209</sup>

- a. The restriction must be in accordance with a law.<sup>210</sup>
- b. The restriction must be legitimate.<sup>211</sup>
- c. The restriction must be necessary.<sup>212</sup>
- d. The restriction must be proportionate.<sup>213</sup>

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<sup>207</sup> Article 30, IACHR

<sup>208</sup> Laurence Burgorgue-Larsen, Amaya Ubeda de Torres and Rosalind Greenstein, *The Inter-American Court of Human Rights: Case Law and Commentary* (OUP Oxford 2011) 552.

<sup>209</sup> For a general discussion on the conditions see; Ibid 552–558.

<sup>210</sup> Article 30, IACHR

<sup>211</sup> Article 13 (2), IACHR, Case of *Kimel v Argentina* (2008) para 58

<sup>212</sup> *Kimel v Argentina* (2008) para 72-86

<sup>213</sup> Ibid., para 81-95

Reflecting on the above conditions, the Court in *Yakye Axa Indigenous Community v Paraguay*<sup>214</sup> ordered the state to assess legality, necessity and proportionality of expropriation or otherwise. Similarly, In **Kimel v Argentina**<sup>215</sup> the Court found against Argentinian authorities for fining and imprisoning Mr Kimel the sum of 20,000 pesos and 1 year Imprisonment as ‘overtly disproportionate’.<sup>216</sup>

Despite the recognition and application of the doctrine of margin of appreciation, in the Inter-American human rights jurisprudence is not as developed as that of the European Court’s system, the basis for the progression of the doctrine is undoubtedly set in motion. More importantly, the recognition in the Convention of right to property<sup>217</sup> subordinated to the interest of society and tied with justified deprivation further attests to common features of regional human rights Conventions. Therefore, tension between the protection and the justified deprivation could provide a basis for further contextual analysis.

### iii. African Court/Commission

The African Charter on Human and Peoples’ Right (ACHPR), like ECHR and IACHR provides for protection of individual rights as enshrined in the

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<sup>214</sup> *Yakye Axa Indigenous Community v Paraguay* (2005) para 217. Available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_125\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf)

<sup>215</sup> Case of *Kimel v Argentina* (2008) at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_177\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf) (last accessed 6 October 2011)

<sup>216</sup> *Ibid*, para 94

<sup>217</sup> Article 21, IACHR

Charter along with various limitations. In what distinguishes the Charter from other Human rights instruments, the Charter does not contain a general derogation clause entitling member states to suspend their human rights obligations as in the European or Inter-American context.<sup>218</sup> However, in addition to peculiar restrictions contained in the individual articles,<sup>219</sup> the Charter provides for a general limitation clause. Such limitations include 'right of others' 'collective security', 'morality' and 'common interest'.<sup>220</sup>

Indeed, the jurisprudence of the African Court / Commission is quite new compared to the matured jurisprudence of the European system. The express application of margin of appreciation finds its way into the African jurisprudence in *Prince v South Africa*<sup>221</sup> the applicant who alleged violation of his freedom of religion, occupation, lost on all counts on the ground that the subject matter of his right (the Rastafarian faith which allows use of cannabis) is illegal under South African law. More illuminating in the case

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<sup>218</sup> TRG Van Banning and Netherlands Ministerie van Buitenlandse Zaken, *Human Rights Reference Handbook* (Netherlands Ministry of Foreign Affairs 1993) 167.

<sup>219</sup> Individual restrictions include 'arbitrary deprivation', 'laid down by law', 'subject to law and order' 'necessary restriction provided by law.' 'public need in the general interest' etc. Articles, 4, 6, 8, and 14 ACHPR

<sup>220</sup> Article 27 (2), ACHPR provides; "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."

<sup>221</sup> Communication 255/2002, Garreth Anver Prince v South Africa (2004) AHRLR 105 (ACHPR 2004), available at <http://www.chr.up.ac.za/index.php/browse-by-subject/440-south-africa-prince-v-south-africa-2004-ahrlr-105-achpr-2004.html> (last accessed 6 October 2011), See; CRP And Ors v Nigeria (2000) AHRLR 227, para 54, See also; CRP And Anor v Nigeria (1998) AHRLR 191, para 54 where the Commission held; "The African Charter should be interpreted in a culturally sensitive way taking into full account the differing legal traditions of Africa and finding expression through the laws of each Country." For criticism on the 'culturally sensitive' interpretation See; Killander, Magnus, *Interpreting Regional Human Rights Treaties* (September, 06 2011). SUR International Journal on Human Rights, Vol. 7, No. 13, pp. 145-169, December 2010 . Available at SSRN: <http://ssrn.com/abstract=1923206>



was South Africa heavily relied on the principles of subsidiarity and margin of appreciation in its defence. In its Judgement The commission having found in favour of South Africa stated that both subsidiarity and margin of appreciation like in any regional human rights system, they form part of the African Charter and therefore states are disposed in striking a fine balance between competing interests in their domestic sphere. However, the commission cautioned against 'implied restrictive construction' of margin of appreciation, where states might assume to have an unfettered discretion. In other words, the mandate of the commission to supervise on the member state discretions must not be inhibited by the operation of both margin of appreciation and subsidiarity.<sup>222</sup>

The above illustrates the application of the doctrine in the African context at its formative stage. Strikingly, the court has captured both the vertical and horizontal balancing contained in the doctrine. While the vertical balancing is reflected in the recognition of South Africa's right to determine its national rules, policies and guidelines regarding its obligation under the Charter<sup>223</sup>, the horizontal balancing is also reflected in subjecting South Africa's discretion to the Court's supervision.<sup>224</sup> Similarly, although, to date, *Prince*, appear to be the only case where the doctrine is expressly applied, the potential for the operation of the doctrine in the context of property right is quite high. More importantly, article 14 of the Charter like its European and inter-American

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<sup>222</sup> *Prince v South Africa* para 53

<sup>223</sup> *Ibid.*, para 51

<sup>224</sup> *Ibid.*, para 53

counterparts, while guaranteeing right to property also provides for justified restrictions within the ambit of public interest. Therefore, the need to balance contested values pursuant to article 14 is likely to offer a meaningful contribution in analysing the doctrine contextually.

## **2.5 Conclusion**

An attempt has been made in this chapter to trace the evolution of the doctrine of margin of appreciation, and explore some theoretical explanations about the doctrine. It can be said that the doctrine as applied in both its deferential and proportionality sense functions in a manner that enables adjudicators to engage in balancing. While undoubtedly the doctrine is suitable for international adjudication, such as investment treaty arbitration, the application of the doctrine is far from uniform. Apart from the divergent conceptions of the doctrine, the lack of uniformity even within a particular adjudicative body, the diversity of contested values have all cumulatively affect a comprehensive postulation of the doctrine. The challenges of diverse conceptions, lack of uniformity and diversity could be abridged by deducing the application of the doctrine from the perspective of a specific value or right. Indeed, for the purpose of investment treaty arbitration, more particularly, in the context of understanding investor's legitimate expectations, cases of property right and economic related matters are quite germane, and could provide a suitable guide in shaping the formulation and application of investor's legitimate expectations. Before proposing the role of

margin of appreciation in analyzing investor's legitimate expectations, it is *priori* to trace and provide an analytical account of legitimate expectations as understood and applied by investment treaty tribunals. The essence, is to bring to the fore the gaps that need to be filled in through the application of margin of appreciation.

### **Chapter III: Legitimate Expectations in Investment Treaty Arbitration – I: *The Quest for Coherence***

#### **3.0 Introduction**

The current trend in investment treaty arbitration posits that the principle of legitimate expectations assumes a dominant spot in the determination of fair and equitable treatment standard. As the principle articulated by the investment treaty tribunals, it entails that investors are entitled to rely on assurances/legal framework as representations made by host states and in the event of negative alteration of such representations, investors can seek legal redress and demand compensation. The problem sought to be unravelled by this chapter is on the ‘content of the investor’s legitimate expectations,’ particularly the scenarios and elements giving rise to such expectations. While some tribunals have interpreted the principle in a narrow way, others have adopted a broad formulation and application of the principle. The aim of the chapter is to provide an analytical account of the principle as understood by investment treaty tribunals with the aim of establishing that the current conception of legitimate expectations by investment treaty tribunals is ambiguous, incoherent and lacking in clarity. While the tribunals have swayed between narrow and broad approaches in their formulation and application of the principle, both approaches have further led to uncertainty in the jurisprudence. The embedded assumption concluded with explicitly is there is a need for investment treaty tribunals to look outward the regime to help in developing the normative content of the principle of legitimate

expectations, particularly, from the general international law and other mature specialised international law regimes.

In investment treaty context, the practice of investment treaty arbitration shows the significance of protection of investor's legitimate expectations in the determination of violations of treaty standards of protection contained in the BITs, particularly the standard of fair and equitable treatment in both bilateral and multilateral investment treaties.<sup>225</sup> The Principle requires states to respect those expectations of individuals which the states themselves through their action or conduct created. The exact scope of the principle is yet

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<sup>225</sup> The standard of fair and equitable treatment was first referred to in the following instruments, namely article 11 (2) of the Havana Charter for International Trade organization of 1948, the economic agreement of Bogota, united states treaties on friendship, commerce and navigation, Abs-Shawcross draft convention on investments abroad, and OECD Draft convention on the protection of foreign property, and now virtually all bilateral and multilateral investment treaties. OECD, *Fair and Equitable Treatment Standard in International Investment Law*, OECD Working paper on International Investment (OECD Publishing, 2004), 3-7, [http://www.oecd.org/daf/inv/investment-policy/WP-2004\\_3.pdf](http://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf); F. A. Mann described fair and equitable treatment as "so general a provision is likely to be almost sufficient to cover all conceivable cases, and it may well be that other provisions of the agreements affording substantive protection are no more than examples or specific instances of this overriding duty." See; F. A. Mann, *Further Studies in International Law* (Oxford England : New York: Oxford University Press, 1990), 238; There is an on-going controversy as to whether fair and equitable treatment standard is equivalent to international minimum standard recognised under customary international law, or just a mere treaty creature and therefore autonomous, with no link to international minimum standard. In the context of NAFTA, the Commission issued a binding interpretation that fair and equitable treatment does not go beyond international minimum standard. Two recent monographs in this area renewed the controversy. Iona while criticizing the idea of equating fair and equitable treatment with international minimum standard concluded that such an exercise would circumscribe the coverage of fair and equitable treatment and thereby limit its application. See: Ioana Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law*, 1 edition (Oxford ; New York: Oxford University Press, 2008), 67; 67 On the other hand, Santiago Montt while criticizing the "autonomous" nature of fair and equitable treatment labelled the effort of equating fair and equitable treatment with Neer test as "deliberate" leading to misconception in the jurisprudence. According to Montt, fair and equitable treatment is synonymous with international minimum standard but not limited to the description in Neer's case due to the peculiarities of denial of justice claims. See: Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the Bit Generation* (Intl Specialized Book Service Inc, 2011), 307-310.

not clear due to vague, inconsistent and contradictory findings among the tribunals.<sup>226</sup> Ironically, while Claimants are increasingly relying on the principle to frame their claims, tribunals are interpreting the principle to justify their findings; the contours of the principle remain unsettled. In addition, the scope of applying the principle, continue to raise the tension of overlap with a public interest dimension of the state's regulatory and administrative functions, particularly in highly regulating areas such as human rights, public health, environment, and necessity or public choice. The underlying assumption of the chapter is, given the infancy of the investment treaty regime, the ad-hoc nature of the investment treaty tribunals, and complex nature of legitimate expectations, among other things there is a need for investment treaty tribunals to search amongst the matured international law regimes where the principle of legitimate expectations features and transpose the normative content of the principle.

The chapter begins by tracing the genealogical development of the principle and consequent migration from domestic legal systems to international investment law. Secondly, the chapter traces the basis for invoking the principle by adjudicatory bodies. Next, it provides an analytical account of the principle as understood and applied by investment treaty tribunals. The

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<sup>226</sup> See for instance: *Técnicas Medioambientales Tecmed, SA v The United Mexican States* ICSID Case No ARB (AF)/00/2 (ICSID) [para 154]; *CMS v Argentina* ICSID Case No ARB/01/8; *LG & E v Argentina* ICSID Case No ARB/02/1; *Occidental Exploration and Production Company v The Republic of Ecuador* Case No UN3467 (LCIA); contrast with *Methanex Corporation v USA* (NAFTA 'UNCITRAL 1976'); *Glamis Gold v USA* (NAFTA 'UNCITRAL RULES'); *PSEG Global Inc & Anor v Republic of Turkey* ICSID Case No ARB/02/5 (ICSID); *Parkerings-Compagniet AS v Republic of Lithuania* ICSID Case No ARB/05/8 (ICSID); *SDF (Services) Limited v Romania* ICSID Case No ARB/05/13 (ICSID).

aim is to trace the conception of legitimate expectations in investment treaty arbitration and identify the essential elements of the principle recognized and applied by the tribunals in the determination of investor's legitimate expectations. The chapter concludes with the challenges of the current formulation and application of the principle, and a proposal for a lasting solution in the quagmire of formulation and application of investor's legitimate expectations.

### 3.1 From domestic Law to International Investment Law

Before examining the principle of legitimate expectations under investment treaty arbitration, it must be pointed out that the principle is generally not a new phenomenon in legal parlance. It evolved like many other general principles of law, from various domestic legal systems.<sup>227</sup> In England, Lord Denning MR is credited to set role, the conception of the principle under English law.<sup>228</sup> In the case of *Schmidt v. Secretary of State for Home Affairs*<sup>229</sup> Lord Denning used the phrase 'legitimate expectations' to refer to some form of right or interest to be heard before administrative bodies. Although, schmidt's case dealt with procedural right, the protection of legitimate

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<sup>227</sup> For a general survey of legitimate expectations in national legal systems see; Elizabeth Snodgrass, "Protecting Investors' Legitimate Expectations - Recognizing and Delimiting a General Principle," *ICSID Review* 21, no. 1 (March 20, 2006): 25-30, doi:10.1093/icsidreview/21.1.1; Hector A. Mairal, "Legitimate Expectations and Informal Administrative Representations," in *International Investment Law and Comparative Public Law*, ed. Stephan W. Schill (Oxford University Press, 2010), 415-418, <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199589104.001.0001/acprof-9780199589104-paper-13>.

<sup>228</sup> Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (Hart Publishing 2000) 47.

<sup>229</sup> *Schmidt & Anor v Secretary of State for Home Affairs* [1968] EWCA Civ 1 (EWCA (Civ)).

expectations now covers both procedural right and arguably substantive rights.<sup>230</sup> Since *schmidt*, the doctrine has evolved within England and significant number of commonwealth countries.<sup>231</sup> Similarly, in Germany the concept of '*vertrauensschutz*' which refers to protection of confidence is said to have inspired the principle of legitimate expectations in European Union law.<sup>232</sup> Other countries that have either directly recognised the doctrine or have some traces of its operation include United States of America, Spain, and some Latin American Countries.<sup>233</sup>

French legal system on the other hand, doesn't seem to recognise the principle.<sup>234</sup> The reason being, not far from the associated criticisms of the principle that it could undermine the principle of legality of administrative functions, and restricts the exercise of discretionary powers vested in administrative bodies.<sup>235</sup> It can be argued however, that certain elements of the doctrine of vested rights '*droits acquis*', as provided for under the French law, have touched on some aspects of legitimate expectations and functions in an analogous manner with the principle.<sup>236</sup>

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<sup>230</sup> *Coughlan & Ors, R (on the application of) v North & East Devon Health Authority [1999] EWCA Civ 1871 (EWCA (Civ))* 622; William Wade and Christopher Forsyth, *Administrative Law* (10th edn, OUP Oxford 2009) 446.

<sup>231</sup> For Indian Perspective See Usha Antharvedi, 'Judicial Review of Administrative Actions and Principles' <<http://papers.ssrn.com/abstract=1104955>> accessed 24 November 2014; For South African perspective See MA Ikhariale, 'The Doctrine of Legitimate Expectations: Prospects and Legal Problems in Constitutional Litigation in South Africa' (2001) 45 *Journal of African Law* 1, 1-12.

<sup>232</sup> Thomas (n 4) 42.

<sup>233</sup> Mairal (n 3) 415-418.

<sup>234</sup> Søren Schønberg, *Legitimate Expectations in Administrative Law* (OUP Oxford 2000) 114-117.

<sup>235</sup> *ibid* 114.

<sup>236</sup> Snodgrass (n 3) 27.



The conception of legitimate expectations in various domestic legal systems is certainly not uniform. There are few, and in some cases wide variations between domestic legal systems. Without deemphasizing the differences, the general idea to be deduced from the overall function of the principle in various domestic legal systems reveals that, regulatory and administrative bodies have to function with a sense of responsibility not to over-step the limits set by the law, taking into account that individuals in a given polity are entitled to rely and plan their lives with the understanding that public authorities would function within the law.

Under International law, the concept of legitimate expectations is not a recent practice as it has been invoked and referred to in various contexts. In the field of international investment law, the concept currently plays a significant role. In the *Expropriated Religious Properties in Portugal award*, the tribunal referred to the concept of legitimate expectations of the parties to the arbitration in the following words:

*"...the following settlement of the claims, the subject of the present arbitration, appears as just and equitable and of a nature to satisfy the respective legitimate expectations of the parties,..."*<sup>237</sup>

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<sup>237</sup> *Great Britain, Spain and France v Portugal Permanent Court of Arbitration (Hague Tribunal) Award rendered on Sept 2 and 4 1920 (Elihu Root, Johnkerr Lohman, Charles Lardy)* Hague Court Rep; In the *Aminoil award*, the tribunal relied on the principle of legitimate expectations in assessing compensations to be paid. See: *Kuwait v Aminoil Award* (1982) 21 Int Leg Mater ILM; For a commentary on *Aminoil award*, see: Martin Hunter and Anthony Sinclair, 'Aminoil Revisited Reflections on a Story of Changing Circumstances', *Weiler Todd, International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005).

In addition, publicists have argued, that rules of customary international law entails legitimate expectations, and not only that 'may be all rules of international law involve legitimate expectations'.<sup>238</sup> According to Byers, the principle of legitimate expectations simply means:

*"...states are legally justified in relying on each other to behave consistently with previous assurances or patterns of behaviour-if those assurances or patterns or that behaviour is of a type, and takes place within a context, such that it is considered legally relevant by most if not all states."*<sup>239</sup>

The reference to legitimate expectations by the early tribunals and scholars of public international law shows that for long, the relevance of the principle has been recognised and in some instances applied in international law.<sup>240</sup> In investment treaty context, the principle as applied under fair and equitable treatment and indirect expropriation claims can arguably be described as a new phenomenon in investment treaty arbitration. It evolves from the overall functions of the arbitrators and the tribunals as a whole in the determination of disputes before them.<sup>241</sup> The tribunals, functioning within a wider context of international tribunals, rely on the various interpretative tools, such as Vienna Convention on the Law of treaties, and the generality of sources of international law in interpreting the provisions of the bilateral/multilateral

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<sup>238</sup> Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press 1999) 107.

<sup>239</sup> *ibid.*

<sup>240</sup> C Brown, 'The Protection of Legitimate Expectations As A 'General Principle of Law': Some Preliminary Thoughts' (2009) 6 Transnational Dispute Management (TDM) 2 <<http://www.transnational-dispute-management.com/article.asp?key=1303>> accessed 24 November 2014.

<sup>241</sup> According to Douglas, '...A tribunal would be on safer ground by making reference to the principle of estoppel or legitimate expectations to give content to the fair and equitable standard of treatment, rather than appealing to the policy of achieving "greater economic cooperation" between the contracting states to the treaty...' Zachary Douglas, *The International Law of Investment Claims* (1 edition, Cambridge University Press 2009) 84.

investment treaties, and ‘interleaving flesh’ into the treaty provisions, especially the major standards of national treatment, most favoured nation, full protection and security and fair and equitable treatment.<sup>242</sup> The later, being the gate-way to the current prominence of legitimate expectations was admittedly vague and hard to define save by reference to certain principles clarifying its content.<sup>243</sup> Legitimate expectations as the most prominent<sup>244</sup> and more encompassing<sup>245</sup> of all the principles becomes the pinnacle of framing claims alleging violation of fair and equitable treatment and indirect expropriation. The nebulous nature of fair and equitable treatment and the degree of subjectivity involved in its interpretation is the root cause to the current role and prominence of legitimate expectations in investment treaty arbitration.<sup>246</sup>

### 3.2 Justification and Juridical basis

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<sup>242</sup> For a comprehensive account of standards of treatment under investment treaties, See: Andrew Newcombe, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 147–377; See also: August Reinisch (ed), *Standards of Investment Protection* (OUP Oxford 2008).

<sup>243</sup> Some of the principles embraced by fair and equitable treatment standard apart from ‘legitimate expectations’ includes, denial of justice, transparency, due process, unjust enrichment, arbitrariness, Good faith, Freedom from coercion and harrassment etc, See: Tudor (n 1) 154–180; See: Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2 edition, OUP Oxford 2012) 133–149.

<sup>244</sup> *Saluka Investments BV (The Netherlands) v The Czech Republic Partial Award* (Watts, Fortier, Behrens) (PCA (UNCITRAL)) [para 302].

<sup>245</sup> Vandevelde is a critique to the view that legitimate expectations encompass the entire fair and equitable treatment elements. ‘...the legitimate expectations doctrine is best understood as referring to the situation where the security principle is breached by host-state conduct inconsistent with prior promises or assurances on which the investor relied, rather than as a complete theory of the fair and equitable treatment standard...’ See: Kenneth J Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (OUP USA 2010).

<sup>246</sup> Douglas (n 17) 84 The exception to this assertion is where a treaty unequivocally provides for the protection of legitimate expectations. See: Article B 4 (a) (ii) of United States Model Bilateral Investment Treaties of 2004, Available at [http://www.bilaterals.org/IMG/doc/2004\\_update\\_US\\_model\\_BIT.doc](http://www.bilaterals.org/IMG/doc/2004_update_US_model_BIT.doc).

The justification for invoking investor's legitimate expectation can be viewed from two Perspectives. The first is substantive perspective, while the second is the procedural or juridical perspective. Substantive justification is important due to the need for a plausible theory to justify the formulation and application of legitimate expectations and accommodate the entire conception of the principle. Fairness derivation from justice augments the theory that focusses on the prevalence of manifest disappointment resulting in harm, damage or loss inflicted upon a private entity, despite reliance on public bodies to the contrary. Here, the general sense of fairness and equity dictates that unjustified damage, harm or loss should be prevented, erased or compensated. This idea stems from the general moral anathemization of unjustifiable harm which invariably is in accord with the Kantian notion of humanity and associated components of dignity, respect and confidence. In practical terms, otherwise non-moral explanation, it goes without saying that an expectation frustrative measure resulting in loss to a foreign investor may have the effect of precluding society at large from the value of utilizing such investment, including influencing investor's decision in future. Therefore, reliance justification is not far from the synergy between public/administrative law on one hand and justice, equity or fairness on the other hand.<sup>247</sup> The logic behind this sense of fairness lies partly in the role of

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<sup>247</sup> On the interface between public law and equity see: Chief Justice Robert French, 'The Interface between Equitable Principles and Public Law' (29 October 2010) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj29oct10.pdf>>.

the 'protection' towards strengthening positive reliance and confidence between public and private entities otherwise theorised as 'reliance theory'.<sup>248</sup>

Another substantive justification attributed to the invocation of legitimate expectations is the role of the 'protection' in terms of promoting regulatory and administrative certainty and predictability. This idea of legal certainty and predictability as leading commentators argued, is rooted in the 'rule of law theory'. Other justifications offered include trust, confidence, equity and good faith theory.

The second dimension to the justification is the procedural or juridical element that rationalises the recognition and protection of legitimate expectations from a pure legal viewpoint. Here, protection of investor's legitimate expectations like any other legal principle must derive its legitimacy from the recognised sources of law. This process entails subjecting the principle to rigorous legal scrutiny, to establish the legality, scope, and above all possible limitation if any. It is the procedural justification that characterizes investment treaty tribunal's engagement with the principle of legitimate expectations.

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<sup>248</sup> 'Reliance theory is originally a private law notion which underpins contractual obligations. For the expansive role of reliance in legitimate expectations context See: Daphne Barak-Erez, 'The Doctrine of Legitimate Expectations and the Distinction between the Reliance and Expectation Interests' (2005) 11 European Public Law 583.

A contending juridical justification for applying legitimate expectations by investment treaty tribunals is the purported recognition of the principle as a general principle of law. The basis for this contention lies in the recognition of the principle in various national laws which could derivatively be elevated to the general principles of law. As argued by Elizabeth, 'legitimate expectations can be justified as reflecting a 'general principle of law recognized by civilized nations'.<sup>249</sup> As is customary with most of contested general principles of law, the issue of universality and unanimity in its recognition and the underlying divergence among states would remain a hurdle. In view of these concerns, some scholars quarried on the divergent conceptions of the principle, while others went further to contend<sup>250</sup> that legitimate expectations can be justified only where the host state's legal system provides for the application of the principle (necessary application to the foreign investment as a host state law), or where it is applied as an appropriate standard of compensation under international law.

Indeed, most of the investment treaty tribunals seem to justify their application of legitimate expectations pursuant to the good faith principle

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<sup>249</sup> Snodgrass (n 3) 2.

<sup>250</sup> According to Sornarajah, '...where a state inveigles a foreign investor by holding out promises and does not fulfill those promises through the creation or recognition of rights entailed in the expectations created by those promises, it is accepted by developing countries which articulated the notion of appropriate compensation that the foreign investor must be paid full compensation for the denial of the rights which are created by the promises...' See M Sornarajah, 'The Neo-Liberal Agenda in Investment Arbitration: Its Rise, Retreat and Impact on State Sovereignty', *Shan, Simons and Singh (ed), Redefining Sovereignty In International Economic Law* ((Hart Publishing 2008) 221.

under International law. Given this assertion by the tribunals, the next section shall examine the arbitral contention of rooting legitimate expectations pursuant to the Principle of good faith.

### 3.3 Good Faith as foundational basis for legitimate expectations

The obligation to act in good faith has been generally regarded as a general principle of law recognised under international law. Although good faith has many manifestations,<sup>251</sup> In Nuclear Tests case the ICJ underscores the relevance of good faith in the context of undertaking legal obligations as follows:

*“One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith....Just as the very rule of pacta sunt Servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.”*<sup>252</sup>

In the context of investment treaty arbitration, article 31 (1) of the VCLT can be regarded as the gate-way through which the tribunals usually invoke the concept of good faith in both its interpretive and substantive sense.<sup>253</sup> Article 31 (1) provides that *“treaties must be interpreted in good faith in accordance with*

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<sup>251</sup> On various manifestations of good faith, see; Robert Kolb, ‘Principles as Sources of International Law (With Special Reference to Good Faith)’ (2006) 53 Netherlands International Law Review 1 See also;; Thomas Cottier and Krista Nadakavukaren Schefer, ‘Good Faith and the Protection of Legitimate Expectations in the WTO’ [2007] Challenge of WTO law : collected essays; AFM Maniruzzaman, ‘The Concept of Good Faith in International Investment Disputes - the Arbitrator’s Dilemma’ (2012) 2012 Amicus Curiae 16; Marion Panizzon, ‘Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation, and Fair Dispute Settlement’ (Hart ; Schultsess 2006).

<sup>252</sup> *Nuclear Tests (New Zealand v France) Judgement*, [1974] ICJ Rep 457 [49].

<sup>253</sup> *International Thunderbird Gaming Corporation v United Mexican States* (NAFTA ‘Uncitral’) [paras 10 & 25].

*its object and purpose*".<sup>254</sup> While interpreting the treaty standard of fair and equitable treatment and the governmental conduct giving rise to compliance or violation of the standard, investment treaty tribunals seem to find solace in resorting to good faith and its associated principles particularly, the principle of legitimate expectations.<sup>255</sup> Good faith principle is a recognized principle of law from antiquity<sup>256</sup> to the modern era.<sup>257</sup> According to Thunderbird award, good faith is an international customary law principle.<sup>258</sup> In his separate opinion in **Thunderbird**, the late professor Walde concluded that although legitimate expectations is not explicitly mentioned in the treaty, it is however, recognized as part of the good faith principle, therefore a general principle of law and a guiding principle for interpreting fair and equitable treatment. Subsequent tribunals have continued to justify recourse to good faith generally by drawing an analogy with the role of the principle under domestic legal systems. For instance, In **Malicorp v Egypt**, the tribunal provides for the justification as follows:

"It is indisputable,...that the safeguarding of good faith is one of the fundamental principles of international law and the law of investments. As in domestic law, the principle fulfils a complementary function; it allows for

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<sup>254</sup> United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html> [accessed 29 May 2014] s Article 31 (1).

<sup>255</sup> *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States ICSID Case No. ARB (AF)/00/2* (n 2) [para 154].

<sup>256</sup> The notion of good faith is said to be practiced by '...all ancient civilisations as a means of recognising the integrity of promises made both within a social order and in the international realm...' See 'International Law in Antiquity | Public International Law' (Cambridge University Press) 52 <<http://www.cambridge.org/us/academic/subjects/law/public-international-law/international-law-antiquity>> accessed 25 November 2014.

<sup>257</sup> 'Charter of the United Nations' s Article 2 (2) <<http://www.un.org/en/documents/charter/>> accessed 25 November 2014.

<sup>258</sup> *International Thunderbird Gaming Corporation v United Mexican States Mexico* (NAFTA 'Uncitral') 147.



lacunae in the applicable laws to be filled, and for that law to be clarified by the specific application of existing principles.”<sup>259</sup>

Indeed, the crux of invoking the concept of good faith as the foundational basis of investor’s legitimate expectation lies in the neglect or paying lip service to the other side of good faith. In other words, while good faith could be resorted to as justification for the protection of investor’s legitimate expectations, could same concept justify violations of investor’s legitimate expectations in good faith?

Thus, in testing the justification of rooting legitimate expectations pursuant to good faith principle, some commentators wondered, whether an administrative and frustrating measure in good faith could ever be in violation of investor’s legitimate expectations rooted in the notion of good faith.<sup>260</sup> Indeed, the dilemma in the puzzle is how one good faith could invalidate another good faith.

### **3.4 Scenarios of legitimate expectations in investment treaty Awards**

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<sup>259</sup> *Malicorp Limited v The Arab Republic of Egypt Case No ARB/08/18* [116].

<sup>260</sup> The query was made pursuant to the findings of investment treaty tribunal that investor’s legitimate expectations could be violated by a state measure even if the frustrative measure is made in good faith. On the other hand, and in defense of the investment treaty tribunals, it could be argued that a foreign investor ought not to be made to suffer for a good faith measure undertaken by a host for the benefit of its public. In other words, who is in a better position to bear the cost of such measure. See *LG & E v Argentina Case No. ARB/02/1, Award of (Maekelt, Rezek, Van den Berg)*, para 129 (ICSID 2007) See also; A. von Walter, “The Investor’s Expectations in International Investment Arbitration,” *Transnational Dispute Management (TDM)* 6, no. 1 (March 2, 2009): 30, <http://www.transnational-dispute-management.com/article.asp?key=1361>.

Reference to legitimate expectations in investment treaty arbitration is confined to investor's legitimate expectations. The principle is formulated using various expressions such as 'legitimate expectations' 'basic expectations' 'reasonable expectations' and 'investment-backed expectations'. There are two main scenarios, giving rise to investor's legitimate expectations.<sup>261</sup> First, is where a state makes clear and unequivocal representations to a foreign investor, or conduct itself in a specific way, thereby forming the basis upon which the foreign investor relies and invests. The basis for this scenario is the initial representation/conduct that arose from the host state. The second scenario is where the state offers stable and predictable legal framework as the basis upon which the foreign investor relies and invests. Unlike the first scenario, the basis for this is the entire regulatory framework put in place by the host state. In both scenarios, adverse and frustrating measures are likely to result in loss or damages to the investor thereby violating investor's expectations. There is no demarcation line between the two main scenarios. As nothing prevents investor's from relying on both from a single set of fact, provided each can be supported. In fact, in many cases, the scenarios are either mixed or frustrated by a single administrative/regulatory measure. A hybrid scenario, though controversial is where the representation element of the legitimate expectations crystallizes

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<sup>261</sup> According to Dolzer and Schreuer legitimate expectations may be created either by explicit undertaking such as contract or implicit undertaking such as legal framework. See Dolzer and Schreuer (n 19) 104–105 For a contrary view, see; Montt (n 1) 360–362.

into a contract or license given to a foreign investor.<sup>262</sup> Although a discussion of the latter will be intersected within the two main scenarios, a typical exemplification of this scenario is an investment agreement which provides for stabilisation clause. Stabilisation clauses are generally regarded as a contractual device for protecting foreign investment.<sup>263</sup> Although the precise effect of the clause is unclear, the purpose is clearly to reinforce the principle of sanctity of contracts. One of the locus classicus arbitrations of stabilisation clause is *Kuwait v Aminoil*.<sup>264</sup> The dispute arose when the government of Kuwait sought to terminate a sixty years concession with Aminoil. The stabilisation clause in the concession contract provides as follows:

*"The Sheikh shall not by general or special legislation or by administrative measures or by any other act whatever annul this Agreement except as provided in Article 11. No alteration shall be made in terms of this Agreement by either the Sheikh or the Company except in the event of the Sheikh and the company jointly agreeing that it is desirable in the interests of both parties to make certain alterations, deletions or additions to this Agreement."*<sup>265</sup>

The tribunal held regarding stabilisation clause that although the clause no longer retains its 'absolute character' nonetheless it provides a basis for legitimate expectations as to damages which the tribunal need to recognise.

According to the tribunal;

*"For assessment of that equilibrium itself, and of the legitimate expectations to which it gives rise, it is above all the text of the contract that signifies, and it is of moment*

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<sup>262</sup> The main criticism is due to the tendency for the tribunal applying this form of legitimate expectations to rewrite (in its own terms) what the parties had initially agreed thereby overstepping its mandate. See *MTD Equity Sdn Bhd And MTD Chile SA v Republic of Chile* (ICSID ARB/01/7) *Annulment Proceeding*, (Guillaume, Crawford, Noriega) (ICSID) See also; James Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24 *Arbitration International* 351, 374.

<sup>263</sup> M Sornarajah, *The International Law on Foreign Investment* (3 edition, Cambridge University Press 2010) 279–284.

<sup>264</sup> *Kuwait v Aminoil Award* (n 13).

<sup>265</sup> *ibid* 991.

*that this text should be precise and exhaustive. But it is not only a question of the original text; there are also the amendments, the interpretations and the behaviour manifested along the course of its existence, that indicate (often fortuitously) how the legitimate expectation of the Parties are to be seen, and sometimes seen as becoming modified according to the circumstances.”*<sup>266</sup>

Since Aminoil’s reference to legitimate expectations in the context of compensation, the scenario remains unclear as to the connection between stabilisation clause and investors legitimate expectations. Undoubtedly, not only stabilisation clause, the totality of investment contracts could generate investor’s legitimate expectations as to performance and compliance with the agreed terms. However, where such contract or clause exists, hardly would the tribunal’s bother to ascertain any form of expectations beyond the contractually agreed terms. Moreover, stabilisation clauses are purely a contractual product, while investor’s legitimate expectations emanates from treaty domain. As a commentator warned, *“reference to a general vague standard of legitimate expectations is no substitute for contractual rights.”*<sup>267</sup> In *Total S.A. v Argentina* the tribunal delineates the function of stabilisation clause and narrows it only to a contract by refusing to acknowledge license as a source of stabilisation clause. According to the tribunal;

*“...it is not correct to qualify and treat the TGN Licence provisions as stabilisation clauses agreed between Total and Argentina. Stabilisation clauses are clauses, which are inserted in state contracts...with the intended effect of freezing a specific host State’s legal framework at a certain date, such that the adoption of any changes in the legal framework at a certain date, such that the adoption of any changes in the legal regulatory framework of the investment concerned...would be illegal.”*<sup>268</sup>

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<sup>266</sup> *ibid* para 149.

<sup>267</sup> Crawford (n 38) 373.

<sup>268</sup> *Total SA v Argentina Republic ICSID Case No ARB/04/01 Decision on Liability* (ICSID) [101].

Similarly, the tribunal in **Parkerings v Lithuania** and many other awards have clearly distinguished ‘expectations’ of compliance with contractual clauses and the Principle of legitimate expectations. According to the tribunal in **Parkerings**:

*“The expectation a party to an agreement may have of the regular fulfilment of the obligation by the other party is not necessarily an expectation protected by international law. In other words, contracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law. Indeed, the party whose contractual expectations are frustrated should, under specific conditions, seek redress before a national tribunal.”<sup>269</sup>*

Therefore, while presence of stabilisation clause in the relationship between foreign investor and host state could have presented a crystal and upper level scenario of legitimate expectations, the practice has shown that where reliance is placed on stabilisation clause hardly would the tribunals embark on the analysis of ascertaining violation or otherwise of investor’s legitimate expectations. The reason may not be far from the discussion above, that the specificity of such contractual commitments as a whole, may not pave way for the extrapolation of a principle more particularly when the tribunals are cautious not to substitute contractual and even treaty agreements with external principles or concepts. As the ad hoc Committee in **MTD v Chile** cautions:

*“The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty.....A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the*

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<sup>269</sup> *Parkerings-Companiet AS v Republic of Lithuania ICSID Case No.ARB/05/8 (n 2) [344].*

*BIT might well exceed its powers, and if the difference were material might do so manifestly.”*<sup>270</sup>

The two main scenarios of investor’s legitimate expectations will be examined in the light of the arbitral awards. The analysis will seek to establish from the awards, the recognition among tribunals, of the fundamental requirements of investor’s legitimate expectations, and the facts giving rise to such requirements.

*a. Representation/Conduct based scenario:*

Legitimate expectations pursuant to state representations or conduct may arise where a state through oral or written representations or conduct gives an assurance to a foreign investor that galvanises investor’s expectations. These assurances may be conveyed through letters, electronic communications, circulars, statements by competent administrative bodies, or any other form of communication adopted by the state. In **Thunderbird v Mexico** the tribunal formulated this form of legitimate expectations as follows:

*“...legitimate expectations relates, within the context of the NAFTA framework, to a situation where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.”*<sup>271</sup>

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<sup>270</sup> *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile, ICSID Case no ARB/01/7, Award, 25 May 2004, Decision on the Application for Annulment, [67].*

<sup>271</sup> *International Thunderbird Gaming Corporation v. United Mexican States Mexico* (n 34) 147.

The fact giving rise to the above formulation is that the claimant obtained a written representation regarding the legality of its investment under the Mexican laws. Subsequently, the Mexican government through an administrative order revoked the business permit of the claimant on the ground that the investment is in violation of the Mexican laws which prohibit gambling and luck games. The tribunal after formulating the notion of investor's legitimate expectations (supra) concluded that, in view of the investor's knowledge of the existing Mexican laws regarding gaming, and investor's refusal to disclose fully the 'chance' element in its game machine, no legitimate expectation is generated upon which the foreign investor could reasonably rely.<sup>272</sup>

In a separate opinion, Prof Thomas Walde however, disagrees with the majority members of the tribunal and opined that the Mexican government should be held liable for violating investor's legitimate expectations. In his separate opinion, he opined:

*"Investors need to rely on the stability, clarity and predictability of the government's regulatory and administrative messages as they appear to the investor when conveyed-and without escape from such commitments by ambiguity and obfuscation inserted into the commitments identified subsequently and with hindsight..."*<sup>273</sup>

In **Tecmed v United Mexican States**, the tribunal formulated the principle rather widely as follows:

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<sup>272</sup> *ibid* 148.

<sup>273</sup> *International Thunderbird Gaming Corporation v. United Mexican States* (n 29) [para 5].

*“ ...in light of the good faith principle established by international law, requires the contracting parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host state to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investment, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations...”<sup>274</sup>*

The nature of investor's expectations in Tecmed is mixed derived from both representation/conduct and regulatory and administrative framework of Mexico. The fact giving rise to the above broad formulation arose from a revocation of the investor's unlimited mining license, and replacement of the license with a limited license. According to the tribunal, where Mexican state through its public authorities refused to renew and extend the investor's permit to enable the investor operate its landfill, notwithstanding an expectation to the contrary 'belongs to the wider framework of the general conduct'<sup>275</sup> of the state which affects directly the investor and the investment in issue. The tribunal considered the principle of legitimate expectations in both fair and equitable treatment and expropriation analysis. The nature of investor's legitimate expectations as outlined by the tribunal include, the basic expectations the foreign investor had that its investment was lawful and will extend over a long term including renewal of required licenses to operate.<sup>276</sup>

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<sup>274</sup> *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States ICSID Case No. ARB (AF)/00/2* (n 2) [para 98].

<sup>275</sup> *ibid* 165.

<sup>276</sup> *ibid* 149.



Similarly, the subsequent political and social pressure notwithstanding, the investor is entitled to expect the host state to abide by its representations or conduct regarding its previous decisions on the issuance of the permit and the same will not be arbitrarily revoked.<sup>277</sup>

In **Waste Management Inv, v The United Mexican States**<sup>278</sup> The tribunal, though having found no violation of fair and equitable treatment, examined the elements that could give rise to violations of fair and equitable treatment. According to the tribunal, and in line with *SD Myers*,<sup>279</sup> *Mondev*,<sup>280</sup> *ADF*,<sup>281</sup> and *Loewen*,<sup>282</sup> regarding the minimum standard of treatment of fair and equitable treatment, concluded that it is relevant in applying the standard first, there has to be a representation and breach of the representation in the form of conduct (frustrative)<sup>283</sup> attributable to the host state. Secondly, the claimant must have reasonably relied on the representation.<sup>284</sup> Lastly, the claimant must suffer harm from the conduct. The tribunal's finding on expropriation was evaluated in the light of the surrounding circumstance in

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<sup>277</sup> *ibid* 154.

<sup>278</sup> *Waste Management Inv, v The United Mexican States ICSID Case No ARB (AF)/00/3 (NAFTA)*.

<sup>279</sup> *SD Myers Inc v Government of Canada* [paras 258–269].

<sup>280</sup> *Mondev v United States of America Case No ARB(AB)/99/2* [para 125].

<sup>281</sup> *ADF v United States of America ICSID Case No ARB(AF)/00/1 (NAFTA)* [para 179].

<sup>282</sup> *Loewen v United States of America ICSID Case No ARB(AF)/98/3* [paras 124–128].

<sup>283</sup> The conduct exemplified by the tribunal refers to 'arbitrary, unfair, idiosyncratic, discriminatory, with exposure to sectional or racial prejudice, lack of due process which offends judicial propriety, manifest failure of natural justice in judicial proceedings, and complete lack of transparency and candour in administrative process'. See *Waste Management Inv, v The United Mexican States ICSID Case No. ARB (AF)/00/3* (n 54) [para 98].

<sup>284</sup> *ibid*.

which the investment was made.<sup>285</sup> In particular, the tribunal noted that international law of expropriation is not meant to eradicate normal commercial risks or bad business decisions.<sup>286</sup>

In *MTD v Chile*<sup>287</sup> the claimant alleged that the respondent galvanises its expectations by approving the investment project, proposing a location for the project and further signing a contract. The claimant further alleged that same expectations were frustrated by the respondent due to the subsequent disapproval of the project location after the claimant had already committed its investment.<sup>288</sup> The Respondent, on the other hand, argued that the disapproval by the ministry of Housing and Urban Development was due to realisation that the project location conflicts with urban development policy. Thus, a prudent investor should conduct rigorous due diligence to acquaint itself with local laws, regulations and administrative process relevant to its investment.<sup>289</sup> The tribunal, applying the Tecmed formulation of legitimate expectations found that:

*“Approval of a project in a location would give prima facie to an investor the expectation that the project is feasible in that location from a regulatory point of view...the inconsistency of action between two arms of the same Government vis-à-vis the same investor even where the legal framework of the country provides for a mechanism to coordinate.”*<sup>290</sup>

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<sup>285</sup> According to the tribunal ‘it is clear that the arrangement was not commercially viable, taking into account both the lower than expected proportion of customers serviced and the additional costs incurred.’ See: *ibid* para 57.

<sup>286</sup> *ibid* para 177.

<sup>287</sup> *MTD Equity Sdn Bhd And MTD Chile SA v Republic of Chile (ICSID ARB/01/7)*.

<sup>288</sup> *ibid* 116.

<sup>289</sup> *ibid* 164.

<sup>290</sup> *ibid* 163.

The tribunal concluded by stressing the obligation of the state to conduct itself in a coherent and consistent manner, regardless of how vigilant the foreign investor is.<sup>291</sup>

The respondent dissatisfied with the award proceeded to the annulment committee, challenging the award on the ground that the tribunal exceeded its limit by applying the Tecmed formulation of legitimate expectations as the standard for determining fair and equitable treatment violation. The Committee cautioned the tribunal's approach of relying heavily on the investor's legitimate expectations, on the ground that host state's obligations do not emanate from the investor's expectations but from the investment treaties.<sup>292</sup> More importantly, however, the Committee confirms the relevance of legitimate expectations in the determination of treaty standards. The committee held:

*"Legitimate expectations generated as a result of the investor's dealings with the competent authorities of the host State may be relevant to the application of the guarantees contained in an investment treaty."*<sup>293</sup>

***b. A framework based Scenario:***

Investors' legitimate expectations could emanate from the overall legal and regulatory framework set up by the host state at the time of making an investment. The framework, based scenario simply refers to the stability and predictability of the legal framework of the host states. The idea stems from

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<sup>291</sup> *ibid* 165.

<sup>292</sup> *MTD Equity Sdn. Bhd. And MTD Chile S.A. v Republic of Chile (ICSID ARB/01/7) Annulment Proceeding, (Guillaume, Crawford, Noriega) (n 38) 113.*

<sup>293</sup> *ibid* 69.

the overall inherent nature of a positive investment climate that capital flows and thrives in a legal and administrative environment that is stable and predictable. States on one hand, normally design their regulatory and administrative framework as part of governance policy. Foreign investors on the other hand, in addition to their desire for a stable and predictable legal and administrative framework do rely on the framework offered by the host state in their investment decisions. Therefore, loss or damages, caused by a host state's frustrative measure arising from investor's reliance on the framework offered by the host state, is likely to violate investment treaty provisions relating to fair and equitable treatment. In this sense, stable and predictable legal framework is linked to the treaty obligation of treating foreign investment fairly and equitably.<sup>294</sup> One of the locus classicus awards on stable legal framework, is **Metalclad**<sup>295</sup> where incoherence and lack of coordination and transparency between federal, state and municipality led to violation of Metalclad's legitimate expectations that it would be treated fairly and justly. According to the tribunal:

*"Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a party acting in the expectation that it would be treated fairly and justly in accordance with NAFTA."*<sup>296</sup>

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<sup>294</sup> Dolzer and Schreuer (n 19) 133–140.

<sup>295</sup> *Metalclad Corporation v The United Mexican States Case No ARB (AF)/97/1* [2000] ICSID.

<sup>296</sup> *ibid* 99.

Most of the cases against Argentina, pursuant to their economic crisis fall within this category. For instance, in *CMS v. Argentina*<sup>297</sup>, *LG & E v. Argentina*<sup>298</sup> and *Sempra v Argentina*<sup>299</sup> and *Enron Corporation v Argentina*<sup>300</sup> most of the tribunals held that measures introduced by Argentina during its economic crisis violated investors legitimate expectations of stable and predictable legal framework. The Enron award is enlightening in this regard, as it captures the findings in both *CMS and LG & E*. Enron instituted the claim against Argentina regarding certain tax assessments allegedly imposed by some provinces in respect of a gas transportation company in which Enron participated through a number of corporate arrangements. In addition, Enron registered an ancillary claim with respect to the refusal of the Argentinean Government to allow tariff adjustments in accordance with the United States Producer Price Index. Later, Enron suspended the original claim and continued with the ancillary claim. One of the causes of action invoked by Enron is violation of legitimate expectations regarding stable and predictable legal framework pursuant to Article II (2) (a) of the US-Argentina BIT which provides for fair and equitable treatment. According to Enron, the relevant guarantees contained in the Argentinean legislation, and the ‘frustrative’ measures adopted by Argentina, violated ‘every commitment’ made in its own legislative acts, such as the Gas Law, Gas Decree and the License.

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<sup>297</sup> *CMS v Argentina ICSID Case No. ARB/01/8*, (n 2).

<sup>298</sup> *LG & E v Argentina ICSID Case No. ARB/02/1* (n 2).

<sup>299</sup> *Sempra Energy International v Argentine Republic ICSID Case No ARB/02/16*.

<sup>300</sup> *Enron v Argentina Case No ARB/01/03*.

On its own side, the Argentinean Government argued that violation of FET standard should be evidenced and be premised on 'inconsistency in State action, radical and arbitrary modification of the regulatory framework, or endless normative changes to the detriment of the investor's businesses. It followed that none of the foregoing was 'present in the instant case where the measures adopted were eminently reasonable in the light of the economic crisis described and the changes in the economic conditions of the country'.<sup>301</sup> The Tribunal having made references to the findings of *OEPC*, *CMS*, *LG&E Energy Corp v. Argentine Republic* tribunals concluded that a key element of fair and equitable treatment is the requirement of a 'stable framework for the investment'. It followed that measures taken by the Argentinean Government have significantly changed the regime under which the investment was initially undertaken and implemented.<sup>302</sup> Therefore, the Tribunal found Argentinean Government in breach of investor's legitimate expectations with respect to the FET due to the removal of stable and predictable framework that induced the investment of Enron.<sup>303</sup>

In addition to the Argentinean cases, three other cases all brought against Ecuador illustrates the framework scenario form of investor's legitimate expectations and its recognition in investment treaty arbitration. These cases are *OEPC v. Ecuador*,<sup>304</sup> *MCI Power Group v Ecuador*<sup>305</sup> and *Duke v.*

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<sup>301</sup> *ibid* 254.

<sup>302</sup> *ibid* 264.

<sup>303</sup> *ibid* 262, 267-268.

<sup>304</sup> *OEPC v Ecuador Case No UN 3467 (LCIA)*.

*Ecuador*.<sup>306</sup> In all the three cases, the tribunals have recognized that stable and predictable legal regime forms part of investor's legitimate expectations and is linked to fair and equitable treatment.<sup>307</sup> In *OEPC*, the claimant succeeded in establishing that failure on the side of the Ecuadorian government to refund VAT charges to the claimant violated investor's legitimate expectations since, the refund, forms part of the overall legal and business framework upon which the investment was made.<sup>308</sup> The *MCI Power* tribunal on the other hand, recognises the obligation of fulfilling legitimate expectations but, stresses the need of establishing clarity and exactness of the expectations as opposed to mere claimant's perception or believes.<sup>309</sup> The fact in *Duke* captures the formulation of legitimate expectations and raises some salient issues regarding setting a limit to the protection of investor's expectations. The central argument regarding fair and equitable treatment was that Ecuador failed to maintain stable and predictable framework for the Claimants' investment, and failed to act transparently and in accordance with the Claimants' reasonable and legitimate expectations. Claimant argued that investment was undertaken 'with the reasonable and legitimate expectations that the Government of Ecuador would act strictly in accordance with its laws and contractual obligations'. The Claimant further contended that Ecuador's commitments were demonstrated in written and oral assurances

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<sup>305</sup> *MCI Power Group v Ecuador Case No ARB(AF)/03/06*.

<sup>306</sup> *Duke v Ecuador Case No ARB/04/19*.

<sup>307</sup> *OEPC v. Ecuador Case No. UN 3467 (LCIA) (n 80) [191]; MCI Power Group v Ecuador Case No. ARB(AF)/03/06 (n 81) [278]; Duke v. Ecuador Case No. ARB/04/19 (n 82) [339]*.

<sup>308</sup> *OEPC v. Ecuador Case No. UN 3467 (LCIA) (n 80) [191]*.

<sup>309</sup> *MCI Power Group v Ecuador Case No. ARB(AF)/03/06 (n 81) [278]*.

communicated by high-ranking government officials at the pre-investment stage, which, as the Claimant alleged, were not complied with. Meanwhile, Ecuadorian Government denied the claims and objected, stating that the Claimants had neither evidenced that their expectations were built upon the State's conduct, nor that such expectations were destroyed 'as opposed to merely upset' as a result of obscure State conduct.<sup>310</sup> The Tribunal relying on the formulations of legitimate expectations in the *CMS*, *Tecmed*, *Occidental v. Ecuador*, *LG&E v. Argentina* cases, noted that the stability of the legal and business environment is directly linked to the investor's justified expectations.<sup>311</sup> The Tribunal held that:

*".... such expectations are an important element of fair and equitable treatment. At the same time, it is mindful of their limitations. To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest"*<sup>312</sup>

In addition to the above, the award raises some salient issues. First, the tribunal noted that a single hail of legitimate expectations may not necessarily work for all claimants in a situation where there is more than one claimant as revealed before the tribunal.<sup>313</sup> The reason being their expectations may not necessarily be identical. Secondly, the tribunal alluded to a view where the

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<sup>310</sup> *Duke v. Ecuador* Case No. ARB/04/19 (n 82) [330].

<sup>311</sup> *ibid* 340.

<sup>312</sup> *ibid*.

<sup>313</sup> "...To assess the merits of this claim, one must distinguish between expectations of electroquil and those of Duke Energy, as they are not necessarily identical." *Ibid.*, para. 355.



requirement of the reasonableness of legitimate expectations can be deemed regardless of the potency of establishing lack of vigilance and prudence on the side of the foreign investor.<sup>314</sup>

In all the awards considered above, the claimants mostly succeeded either in full or in part in establishing a violation of their legitimate expectations.

Indeed, there is controversy regarding the recognition of this form of legitimate expectations particularly among the commentators.<sup>315</sup> In addition, although considerable numbers of investment tribunals have recognised this form of expectations, others took a diametrically opposite position. For instance, in *Gami*,<sup>316</sup> *EDF*,<sup>317</sup> *Glamis*,<sup>318</sup> and *Parkerings*,<sup>319</sup> the tribunals appear to begin to tame the broad formulation and application of legitimate expectations. One of the methods deployed by the tribunals is by stressing the *internal scrutiny tests* regarding *legitimacy* on the expectations sought to be protected and heightening the ascertainment of the totality of all the relevant elements required in establishing the existence of legitimate expectations. In *Gami Investments, Inc v. The Government of United Mexican States* the Claimant argued that it suffered losses due to the failure of the respondent to enforce export quotas, which frustrated its legitimate expectations that ‘the

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<sup>314</sup> Ibid., para. 363 The tribunal considered the issue of investor’s imprudent business judgment while awarding compensation. See; *ibid.*, 99 footnote 43.

<sup>315</sup> Montt (n 1) 360.

<sup>316</sup> *Gami Investments, Inc v The Government of United Mexican States (Uncitral 1976 Ad hoc)*.

<sup>317</sup> *EDF (Services) Limited v Romania Case No ARB/05/13 (ICSID)*.

<sup>318</sup> *Glamis Gold v USA (n 2)*.

<sup>319</sup> *Parkerings-Companiet AS v Republic of Lithuania ICSID Case No.ARB/05/8 (n 2)*.

government shall announce annually individual export quotas for all mills and shall promptly enforce non-compliance'. According to the tribunal, the claimant failed to establish violation of legitimate expectations under fair and equitable treatment due to the absence of a clear and unambiguous affirmation in the Mexican regulatory regime as perceived by the foreign investor.<sup>320</sup> Moreover, according to the tribunal, the role of investment treaty tribunals is not to evaluate the propriety or otherwise of host state's regulatory frameworks, but to assess how the existing regulatory framework had been applied to the foreign investor.<sup>321</sup> The tribunals held thus:

*"International law does not appraise the content of a regulatory programme extant before an investor decides to commit. The inquiry is whether the state abided by or implemented that programme. It is in this sense that government's failure to implement or abide by its own law in a manner adversely affecting a foreign investor may but will not necessarily lead to a violation of Article 1105..."*<sup>322</sup>

The tribunal clearly brought to light the 'time factor' in the analysis of investor's legitimate expectations.<sup>323</sup>

Similarly, in *EDF (Services) Limited v. Romania*<sup>324</sup> The Claimant alleged that the conduct of Romania with regards to its investments violated Romania's obligation to provide fair and equitable treatment. Romania on the other hand, objected to the claims of EDF arguing that fair and equitable treatment

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<sup>320</sup> *Gami Investments, Inc v. The Government of United Mexican States (Uncitral 1976 Ad hoc)*, (n 92) [76].

<sup>321</sup> *ibid* 93–94.

<sup>322</sup> *ibid* 91.

<sup>323</sup> Schreuer C. and Kriebaum U, 'At What Time Must Legitimate Expectation Exist?', *A liber amicorum* □: *Thomas Wälde: law beyond conventional thought* (Cameron May 2009) 265.

<sup>324</sup> *EDF (Services) Limited v. Romania Case No. ARB/05/13* (n 93); For a discussion on the award See Abhijit PG Pandya and Andy Moody, 'Legitimate Expectations in Investment Treaty Arbitration: An Unclear Future' (2010) 15 *Tilburg Law Review* 93.

is an objective legal standard; comply with, which is heavily fact-dependent and case-specific, and more importantly, emphasis should be put on the investor's objective legitimate expectations and not the subjective stance thereof. Arguing further, Romania noted that the claimant could not have had legitimate expectations that its contractual rights 'would exist beyond the expiration of their specified term, much less that such contracts would be renewed regardless of commercial considerations'.<sup>325</sup>

The Tribunal made it clear that it shared the view expressed by previous tribunals regarding the recognition of legitimate expectations as a whole. It noted, however, that:

*"The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable."*<sup>326</sup>

The tribunal concluded that such expectations cannot be solely subjective and merely interpret the investor's standing. In the Tribunal's view, expectations at the time the investment was made, as well as all the circumstances of the case should be examined with due regard to the host state's regulatory powers in the public interest. In view of the foregoing, the Tribunal held in favor of the Respondent.

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<sup>325</sup> EDF (Services) Limited v. Romania Case No. ARB/05/13 (n 93) [177].

<sup>326</sup> *ibid* 217.

In *Glamis Gold Ltd v. United States of America*,<sup>327</sup> The State of California imposes more reclamation requirement contrary to the initial legal and business framework in which the claimant invests. The claimant argued that claimant measure, through federal and state actions, expropriated its mining rights and was further denied fair and equitable treatment by violating its legitimate expectations to transparent and predictable legal and business framework. The Tribunal noted the practice of previous tribunals and agreed with *International Thunderbird* that:

*“...legitimate expectations relate to an examination under Article 1105(1) in such situations where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct ... In this way, a State may be tied to the objective expectations that it creates in order to induce investment.”*<sup>328</sup>

However, the tribunal departed from most of the previous tribunals by rejecting any form of legitimate expectations pursuant to the stable and predictable framework. According to the tribunal:

*“...a violation of Article 1105 based on the unsettling of reasonable, investment-backed expectation requires, as a threshold circumstance, at least a quasi-contractual relationship between the State and the investor, whereby the state has purposely and specifically induced the investment.”*<sup>329</sup>

Applying the above formulation the tribunal held that the subsequent regulatory and administrative measure ‘...was not arbitrary or manifestly without reasons; was not blatantly unfair or evidently discriminatory; nor did it

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<sup>327</sup> *Glamis Gold v USA* (n 2).

<sup>328</sup> *ibid* 621.

<sup>329</sup> *ibid* 766.

*repudiate expectations formed by a quasi-contractual relationship or evidence a complete lack of due process’.*<sup>330</sup>

Indeed, the Glamis award contributed in setting a threshold of quasi contract in the requirement of investor’s legitimate expectations. This in a way explains its concurrence with Thunderbird, which defines legitimate expectations based on representation/conduct scenario. In addition, the tribunal’s emphasis on additional qualifiers such as ‘purposely’ and ‘specifically’ in relation to the host states’ inducement to the foreign investor could by the wordings of the tribunal elsewhere,<sup>331</sup> make the standard of inducement more stringent.

Lastly, In *Parkerings v Lithuania*<sup>332</sup> the Claimant alleged that its legitimate expectations of stable legal and business environment have been violated by the Lithuanian authorities due to their failure to respect and protect the legal and economic integrity of their agreement. According to the tribunal, whilst host state’s explicit or implicit representations are conducive to and create legitimate expectations on investor’s part, in the absence of such explicit assurance ‘the circumstances surrounding the conclusion of the agreement are decisive to determine if the expectation of the investor was legitimate.’<sup>333</sup> It was further held that while an investor does have a right to a ‘certain stability

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<sup>330</sup> *ibid* 762–766.

<sup>331</sup> *ibid* 617.

<sup>332</sup> *Parkerings-Companiet AS v Republic of Lithuania ICSID Case No.ARB/05/8* (n 2).

<sup>333</sup> *ibid* 331.

and predictability of the legal environment', the investor must demonstrate that 'it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances.'<sup>334</sup> More importantly, the tribunal unequivocally places the burden of anticipation of framework changes on the investor. Accordingly,

*'... an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment.'*<sup>335</sup>

Flowing from the awards considered under the two scenarios, a prima facie investor's legitimate expectations plea need to satisfy the following fundamental requirements: 1. Representation or 'conduct' from the host state. 2. Reliance ie 'reliance on the said conduct' by the foreign investor. 3. Detrimental measure in form of frustration, or 'failure...to honour'. 4. Damages ie (the foreign must have suffered damage or loss as a result of the measure). In addition, the requirement of stable legal and administrative framework is another fundamental requirement to framework scenario as highlighted in the Argentinean and Ecuadorian cases. It is still debatable whether; the requirement of stable legal and administrative framework could substitute the requirement of representation or conduct where there is none. As *Parkerings*, *Glamis*, *EDF*, and *Gami* suggest, anything short of representation or conduct could hardly satisfy the legal requirement of '*representation/conduct capable of inducing reliance*'.

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<sup>334</sup> ibid 333.

<sup>335</sup> ibid 336.

In addition to the fundamental requirements, there are sub-elements which need to be factored into the analysis of legitimate expectations. For instance, the tribunal in *Waste management* factored ‘surrounding circumstance’ in its analysis and hinted at the hazard of mixing ordinary business and commercial risk with an expropriatory measure both of which must be separated. The tribunal in *Parkering* stresses the obligation of the foreign investor to conduct its due-diligence.<sup>336</sup> This requirement, on the face of it contradicts *MTD* tribunal which in a way deemphasizes the role of investor’s vigilance and prudence ‘in investment decision making’ as a factor in the analysis of legitimate expectations.<sup>337</sup> Similarly, while some of the tribunals adopted a generous analysis of the sub-elements leading to a broader formulation and application of the principle, others particularly the later tribunals have squeezed the sub-elements in their analysis to a much narrower formulation and application of the principle.

Therefore, the role of the sub-elements appears very crucial to the formulation and application of legitimate expectations. As most of the awards kick-started the process of unveiling the sub-elements, it becomes necessary to examine the sub-elements critically under the umbrella of their fundamental requirements which have now been established as *a sine - quo non* to legitimate expectations plea. In doing that, the following posers that lingered from the current survey of the awards will be tested. For instance, what are

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<sup>336</sup> *ibid.*

<sup>337</sup> *MTD Equity Sdn. Bhd. And MTD Chile S.A. v Republic of Chile (ICSID ARB/01/7) Annulment Proceeding, (Guillaume, Crawford, Noriega)* (n 38) [165].

the constituent elements of the fundamental requirements of legitimate expectations? In other words, what constitutes representation/conduct? What constitutes reliance? What are the essential characteristics of frustrative measure? What is the quantum of loss or damages? What are the factors to be considered in the analysis of the surrounding circumstance? What is the proper reasonability test? And above all, what makes expectations legitimate?

### **3.5 Tension in the formulation and application of legitimate expectations**

The formulation and application of legitimate expectations by investment treaty tribunals as highlighted earlier, is largely informed by the obligation of host states to treat foreign investment fairly and equitably. The crystallization of such expectations into a protected obligation is further linked to the public and administrative law idea, that private and individual entitlement must be protected against abuse by public authorities. In this regard, the role of investor's legitimate expectations is to safeguard and protect investors from detrimental changes to regulatory and administrative policies of the host state. The extent to which investors should be protected against regulatory and administrative changes is yet unclear. Is the protection absolute? Could there be justified reasons for not protecting investor's legitimate expectations?

Host states on the other hand, are by their nature regulators administrators and policy makers. Their power to regulate and administer policies had for



long been recognised under the customary international law concept of police powers.<sup>338</sup> In recognition of such sovereign attribute, the PCIJ in *Oscar Chin*<sup>339</sup> reaffirmed such principle, while rejecting the argument that *good will is a right that could be expropriated*. The Court held accordingly, that risks due to the general economic conditions are inescapable by enterprises and therefore states should not be held liable.<sup>340</sup> Indeed, there is danger of infringing private right in sweeping application of sovereign or police powers in transnational investment relationship. The state's pursuant to their legitimate regulatory and administrative powers, may negatively impact upon investor's legitimate expectations. This is more imminent, in the highest regulatory and administrative areas, such as public health, public moral, human rights, environment, taxation, or overall public interest, due to necessity or mere public choice. The arbitral awards discussed earlier have shown such tension of the interface and overlap between the competing values. The nagging question then, is where should the right balance be struck?

Undoubtedly, deterring public authorities from performing their regulatory and administrative functions, short of abuse, is likely to generate a chilled - effect on the state's performance of sovereign functions, including assuming newer commitments. It must be noted particularly, flowing from the awards

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<sup>338</sup> The concept of police powers as defined in Black's law dictionary refers to: 'The power of a state to place restraints on personal freedom and property rights of persons for the protection of the public safety, health, and morals, or the promotion of the public convenience and general prosperity...is an essential attribute of government.' See Henry Campbell Black, *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* (West Publishing Company 1990).

<sup>339</sup> *Oscar Chinn Case Britain v Belgium* [1934] Ser AB No63 (PCIJ).

<sup>340</sup> *ibid* 88.

analysed, that where investor's legitimate expectations are formulated narrowly by the tribunal, it will likely attract the narrower application of the principle which may in turn, undermine the treaty protections afforded to the foreign investors in international law. Similarly, a broader approach to the investor's legitimate expectations has the potential of undermining host states regulatory and administrative functions in the public interest. The Saluka tribunal captures this dilemma in the context of expropriation in the following words:

*"...international law ...has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment...It thus inevitably left to the adjudicator to determine..."*<sup>341</sup>

The tribunal further added in the context of legitimate expectations:

*"In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host state's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well..."*<sup>342</sup>

Therefore, balancing between investor's legitimate expectations and state's legitimate regulatory functions is an adjudicatory task to be undertaken by

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<sup>341</sup> Saluka Investments BV (The Netherlands) v The Czech Republic Partial Award (Watts, Fortier, Behrens), para 263-264 (PCA (UNCITRAL) 2006), para 263-264; Saluka para See also Tecmed where the The tribunal evaluates host state's right to regulate in the public interest in the light of investor's legitimate expectations as follows: "...Although the analysis starts at the due deference owing to the state when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal,...to determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation...." Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States ICSID Case No. ARB (AF)/00/2, para 122 (ICSID 2003), para 122.

<sup>342</sup> Saluka Investments BV (The Netherlands) v The Czech Republic Partial Award (Watts, Fortier, Behrens) (n 20) [305].

investment treaty tribunals. In balancing between the two competing principles, the tribunals in *SD Myers*, *Gami*, *Methanex*, *Parkerings*, *Glamis*, and *EDF*, have all shown some form of moderation towards deference to the host states. This is a departure from the early arbitral awards that seem to formulate and apply the principle broadly. According to *SD Myers* tribunal, international law has accorded '*high measure of deference*' to host states and must therefore be observed by investment treaty tribunals.<sup>343</sup>

It is in this context, that the doctrine of margin of appreciation is proposed to play a central role in equipping the tribunals with systematic tools in dredging the tension between investor's legitimate expectations and state's legitimate regulatory and administrative functions. Indeed, the margin of appreciation has its conceptual root under public law. Therefore, unless investment treaty arbitration can be understood as having some relationship with public law, mere transplanting of margin of appreciation may result in exercise in futility, as the regime may lack the requisite pillars to support its application. In this regard, it becomes pertinent to appraise various contending approaches of the entire investment treaty regime. The next section shall begin by tracing the conceptual approaches to investment treaty arbitration in general, with a view to lay the proper background for analysing other regimes and explore methods of extracting lessons from their formulation and application of investor's legitimate expectations.

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<sup>343</sup> *SD Myers Inc. v. Government of Canada* (n 55) [263].

### 3.6 Conceptual Approaches to Investment Treaty Arbitration

Conceptually, one may be tempted to begin by asking the pertinent questions of which approach better illustrates that nature of investment treaty arbitration? And by extension, which, better accommodates and justifies investors' legitimate expectations? In resisting the temptation of addressing such murky questions, a distant albeit efficacious reminder compelled us to pause to the reason that contending approaches in legal parlance can hardly succumb to formal categorisations, so also analogies. As a commentator opined, *"any attempt to categorize adjudicative reasoning risks oversimplification"*.<sup>344</sup> Late Thomas Walde in his work on treaty interpretation appraises various contending approaches in investment treaty arbitration, particularly the blunt grouping of Pro-investor vs Pro-state or dictionary vs policy interpretive approaches. The preference for professional technical approach suggested by Walde is hinged on the expected role to be played by some sort of epistemic community of scholars and arbitrators that could facilitate the emergence of international common law of investment arbitration.<sup>345</sup> Undoubtedly, the emergence of such collegial approach contemplated by Walde manifested in the regime, except with a varied intuitive agendas, on one hand theorising and concretising the scholarly dimension the regime, and on the other hand posing challenges to the regime. These approaches are numerous and open-ended, suffices, however to

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<sup>344</sup> Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2008) 121.

<sup>345</sup> 'Interpreting Investment Treaties: Experiences and Examples', , *International Investment Law for the 21st Century* (Oxford University Press 2009) 730-781.

mention that among the major '*traditional*' approaches are Private/Commercial law approach, and Public Law approach. Other sub and evolving approaches include Investor rights approach, Commercial Arbitration approach, Public International law approach and recently, Comparative Public Law, Global Administrative law, and Constitutional Justice Approaches.<sup>346</sup> These approaches clearly overlap in their countours and to some extent are repetitive. Evaluation of the totality of the approaches is outside the purview of this research.

**a. Public International Law Approach:**

The public International approach generally places emphasis on the reciprocal nature of relations between states.<sup>347</sup> Accordingly, state actions and conduct either treaty-based or otherwise are largely interpreted and conceived by the adjudicators from the prism of its actors being state entities. In appraising the relationship between public international law and investment treaty arbitration, clearly, the nature and historicity of investment treaty arbitration undisputedly makes the regime, a product of public international law though with a unique feature.<sup>348</sup> As treaty based regime, with rich history from

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<sup>346</sup> For general discussion on approaches See Harten (n 120) 121–150 See also; Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2004) 74 British Yearbook of International Law 151; Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 American Journal of International Law 45; Martins Paparinskis, 'Analogies and Other Regimes of International Law' <<http://papers.ssrn.com/abstract=2312308>> accessed 23 February 2015.

<sup>347</sup> Harten (n 120) 131.

<sup>348</sup> On Public International Law character of Investment Treaty Arbitration, see Eric De Brabandere, *Investment Treaty Arbitration as Public International Law* (Cambridge University Press 2014) 15–17.

diplomatic protection to its contemporary outlook where investors can directly institute an action against sovereign states pursuant to an investment treaty seals the public international law identity of the regime beyond any coalescing pedantry. In **Loewen** the tribunal asserting the public international law identity of investment treaty arbitration pursuant to NAFTA opined:

*"NAFTA claims have a quite different character, stemming from a corner of public international law in which, by treaty, the power of States under that law to take international measures for the correction of wrongs done to its nationals has been replaced by an ad hoc definition of certain kinds of wrong coupled with specialist means of compensation."*

Approaching investment treaty arbitration from pure public international law perspective is likely to produce a mismatch<sup>349</sup> due to the presence of additional yet vital entity otherwise referred to as 'foreign investor' in the matrix of the relationship between states concluding investment treaties. In other words, arbitrators will find it easier to interpret and ascertain the intention of the parties to a reciprocal bargain without subjecting themselves to the excruciating effort of discerning the action and behaviour of a non-Party to the bargain as a stand-alone entity. In addition, the multiplicity and proliferation of varied regimes within public international could bar efforts in advancing a holistic public international law approach in investment treaty arbitration.

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<sup>349</sup> For a critical elucidation of public international law approach see; Ibid 131-136.

### **b. Private law – Contractual Approach:**

The private law conception of investment treaty regime in general and investor's legitimate expectations in particular is anchored on the private law adjudicatory process adapted by the regime. This is regardless of the apparent public international law identity of the regime. Private law approach, like public law approach, has many appellations. Amongst its appellations includes contractual approach, commercial arbitration approach and investor right approach. The hallmark of the private law approach is the incorporation of private law or private international law mechanisms of dispute settlement to investment arbitration. Some of the private law and commercial arbitration elements prevalent in investment treaty arbitration include choice of law by the parties, conduct of arbitration, the remedies available, and enforcement of arbitral awards. This mix up between public and private elements in investment treaty arbitration breeds what some commentators termed as 'hybrid foundations' of the regime.<sup>350</sup> Substantively, the approach appears to place greater importance on private law principles at times at the expense of the public law identity of the regime. Thus, expansive interpretations regarding fulfillment of obligations and recurrent reliance on *Pacta sunt Servanda* and good faith obligations seem to take centre stage in analysing the substantive standards of treatment contained in the regime.<sup>351</sup>

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<sup>350</sup> Douglas (n 122).

<sup>351</sup> Sornarajah (n 39) 16–18.

In situating the private law approach to investor's legitimate expectations, as expected, no tribunal appears to openly endorse any conceptual approach of its application of investor's legitimate expectations, with the exception of few arbitral awards.<sup>352</sup> However, traces of private law/contractual approach can be discerned from the pattern of analysis adopted by the tribunals. For instance, as discussed earlier, many tribunals rejected investor's legitimate expectations pursuant to a legal framework set up by the host due to the absence of clear representation.<sup>353</sup> Undoubtedly, the requirement of clear assurance need not to be extended further to denote some form of contractual bargain. Thus, tribunals insisting on the presence of some sort of contractual or quasi contractual form as a necessary element in establishing investor's legitimate expectations, risks the adoption of a totally contractual approach at the expense of the public law identity of the relationship between foreign investors and host states, where individuals such as foreign investors do not enjoy the bonafide locus to 'demand' but can only act upon what the state voluntarily gives or promises to give. Thus, states either voluntarily undertakes or not. In Glamis Gold the tribunal draws analogy with a quasi contract as a threshold for entertaining claims alleging violation of investor's legitimate expectations. Indeed, the *assumpsit* theory as an underlying basis for enforcing quasi contract obligations could hardly be equated with any

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<sup>352</sup> See for instance: 'Wintershall Aktiengesellschaft v. Argentine Republic, Award' <<http://www.italaw.com/cases/documents/1172>> accessed 21 February 2014; *Total S.A. v Argentina Republic* ICSID Case No. ARB/04/01 *Decision on Liability* (n 44); *International Thunderbird Gaming Corporation v. United Mexican States* (n 29).

<sup>353</sup> *Sempra Energy International v Argentine Republic* ICSID Case No. ARB/02/16 (n 75) [298]; *PSEG Global Inc. & Anor v Republic of Turkey* ICSID Case No. ARB/02/5 (n 2) [241-243]; *Total S.A. v Argentina Republic* (n 44) [117].



comparator or even rationalized in a Public, Administrative or Constitutional law reasoning. Although, the outcome of Glamis Gold and other similar tribunals such as Methanex that rejected the formation of investor's legitimate expectations pursuant to legal framework due to the absence of a specific assurance succeeded in substantively narrowing the scope of legitimate expectations, the reasoning followed by the tribunals particularly Glamis Gold, regarding quasi contract analogy may be read with caution. First, the reasoning may be at variance with the notion of investment planning and projection, which is at the heart of almost every rational investment decision making. Second, the nature of legal relationships arising out of administrative, constitutional or public law do not call, contemplate or even made it feasible to envisage explicit contractual reciprocity between public body and private entities. Except in specific transactions, the overriding nature of such relationship is governed by publicness.<sup>354</sup>

More importantly, the private law approach has its own fallacies having regard to the nature of claims arising out of alleged frustrations of investor's expectations. The nature of the such claims most often, are far from private law or contractual claims. For instance, in **Thunderbird v Mexico** the

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<sup>354</sup> The notion of publicness here refers to public features attributable to state actions and conduct aimed at two or more private entities, the opposite of which could degenerate into some sort of special relationship in a positive way or discrimination in a negative way. On the theory of publicness in law and public administration see; Armin Bogdandy, Philipp Dann and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' in Armin Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions*, vol 210 (Springer Berlin Heidelberg 2010) <<http://www.springerlink.com/content/h87k589315251598/>> accessed 1 August 2011; Udo Pesch, 'The Publicness of Public Administration' (2008) 40 *Administration & Society* 170.

investor challenged the revocation of its business permit through an administrative order as tantamount to violation of its legitimate expectations. In **Tecmed v United Mexican States** the investor challenged the revocation of its mining license and the refusal to renew same as amounting to a violation of its legitimate expectations. In **Enron v Argentina** the crux of the investor's claim is the refusal of the Argentinian government to allow tariff adjustments which Enron considered as a frustrating measure and in violation of Argentinian Gas law, Decree and License. The nature of these cases, and indeed many other cases, clearly shows that the disputes are not private law or pure commercial disputes, rather are public and administrative law disputes whose nature need to be delineated. As late Brownlie remarked in **the CME v Czech Republic**:

*"It is simply unacceptable to insist that the subject-matter is exclusively 'commercial' in character or that the interests in issues are, more or less, only those of investor. Such an approach involves setting aside a number of essential elements in the Treaty relation. This first element is the significance of the fact that the Respondent is a Sovereign State, which is responsible for the well-being of its people. This is not to confer a privilege on the Czech Republic but only to recognise its special character and responsibilities. The Czech Republic is not a commercial entity."*<sup>355</sup>

Therefore, in recognising the special character of states as sovereign entity, the public law approach emerges and appears more plausible in explaining the nature of investment treaty arbitration, and providing a suitable approach towards formulation of investor's legitimate expectations due to its

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<sup>355</sup> *Separate Opinion of Ian Brownlie, CBE, QC in CME v Czech Republic (Uncitral)* [174].

recognition of administrative and constitutional mandate of states to discharge their sovereign functions.

**c. Public law – Comparative Public law and Constitutional Approach:**

The public law approach is currently one of the most contending approaches advocated by many scholars of international investment law. The crux of the public law approach is the recognition of the public character of the substantive issues covered by investment treaty disputes and the identity of the states as sovereign entities. States as parties to investment treaties and parties before investment treaty tribunals are not the same as foreign investors. States are sovereign, subject to public law domestically, and subject to public international law under international law. Most of the factual causes giving rise to action regarding violations of investor's legitimate expectations are instances where states engage in the exercise of their regulatory or administrative functions. Generally, regulatory and administrative activities of states as it relates to individuals include powers to tax, enforce laws, and administer governance as whole. On the face of it, states presumably exercise such powers in the public interest and welfare. Thus, disputes arising out of the exercise of such regulatory and administrative functions of states need to be understood as public law disputes, according to public law approach.

The support for the public law approach manifested in the corpus of investment treaty arbitration discourse in varied though related conceptions.

Among various sub-conceptions of public law, are administrative and constitutional dimensions. Van Hatten and Loughlin have described the investment treaty regime as specie of global administrative law.<sup>356</sup> They built their argument on the premise that investment treaty regime as a whole is a means of judicially reviewing and controlling the exercise of public authority by the states and their organs. In justifying their thesis, they argued that the global administrative law feature lies in the fact that investment treaty tribunals established pursuant to the laws of one state could resolve regulatory dispute involving another state.<sup>357</sup> Van Hatten subsequently confined his theory by concretizing the public law approach in his work 'Investment Treaty Arbitration and Public Law'.<sup>358</sup> According to Van Hatten, investment treaty tribunals should recognise the public nature of investment disputes and other wider regulatory issues involved in the settlement of investment disputes including public dissent to investment projects. Walde while expanding the public law approach introduces comparativism into the public law approach in his separate opinion in **Thunderbird v Mexico**. Walde's thesis of comparative public law approach entails both horizontal extractions of public law principles from various domestic legal systems and vertical extraction from other international and supra national regimes. In justifying comparative public law as opposed to private or contractual approach, Walde alluded that "...contract law – presuming the existence of two

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<sup>356</sup> Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 European Journal of International Law 121.

<sup>357</sup> *ibid* 149.

<sup>358</sup> Harten (n 120).

*equal parties in a commercial contract is less relevant than comparative public law with respect to the judicial review of governmental conduct.*"<sup>359</sup> Kolo developing further on the relevance of vertical extraction of public law principles from other international law regimes, underscores the relevance of balancing in deploying margin of appreciation by investment treaty tribunals to decide appropriateness or otherwise of exchange restrictions.<sup>360</sup> Indeed, the support for public law approach from juridical view point is reflected in the plethora of arbitral awards discussed above. For instance, in **SD Myers v Canada**<sup>361</sup> the tribunal conceded to the public law nature of investment treaty arbitration and concurred with the public international law position in according high measure of deference to states. Similarly, the tribunals in *Saluka*,<sup>362</sup> *Tecmed*,<sup>363</sup> *Methanex*, *Parkerings*, and recently *Total*<sup>364</sup> all pointed towards recognition of the Public law approach and reformulation of investor's legitimate expectations from the prism of Public Law. As *Toto* tribunal recently remarked;

*"The fair and equitable treatment standard of international law does not depend on the perception of the frustrated investor, but should use public international law and comparative domestic public law as a benchmark. As was recently confirmed in Total S.A. v. Argentina, "a comparative analysis of what is considered generally fair and unfair conduct by domestic public*

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<sup>359</sup> *International Thunderbird Gaming Corporation v. United Mexican States* (n 29) [27].

<sup>360</sup> Abba Kolo, 'Investor Protection vs Host State Regulatory Autonomy during Economic Crisis: Treatment of Capital Transfers and Restrictions under Modern Investment Treaties' (2007) 8 *The Journal of World Investment & Trade* vii.

<sup>361</sup> *SD Myers Inc. v. Government of Canada* (n 55) [263].

<sup>362</sup> *Saluka Investments BV (The Netherlands) v The Czech Republic Partial Award* (Watts, Fortier, Behrens) (n 20) [263].

<sup>363</sup> *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States ICSID Case No. ARB (AF)/00/2* (n 2) [122].

<sup>364</sup> *Total S.A. v Argentina Republic ICSID Case No. ARB/04/01 Decision on Liability* (n 44) [111].

*authorities in respect to private investors and firms in domestic law may also be relevant to identify the legal standards under BITS.”*<sup>365</sup>

### 3.7 Conclusion

An attempt has been made to present an analytical account of legitimate expectations in investment treaty arbitration. What emerges from the overview undertaken, are two major factual scenarios that could give rise to investor’s legitimate expectations. Both the scenarios as recognised by the investment treaty tribunals must satisfy the four essential ingredients of legitimate expectations namely, *a. Representation/Conduct or framework b. Reliance c. Frustration and d. Damages*. The awards surveyed, however, fell short of first, unearthing the constituents of each of the essential ingredients to enable subsequent tribunals to apply the principle coherently. This problem of ambiguity and gaps in the analysis led to the oscillation of narrower/broader formulation and application of the principle by the tribunals. Undoubtedly, the normative content of the principle is glaringly absent. Factors and elements that could aid in developing the normative content of the principle have either been absent in the analysis, or superficially mentioned by the tribunals devoid of any legal weight. Suffices to conclude, however, that the open-ended list of some of the glaring sub-elements that features in the awards such as *reasonability, unilateral representation, legitimacy, time factor, surrounding circumstance, prudence/due*

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<sup>365</sup> *Toto Costruzioni Generali SPA v Republic of Lebanon* ICSID ICSID Case No. ARB/07/12 [166].

*diligence* would require a more sophisticated approach to define and buttress their role in the overall analysis of legitimate expectations.

It is in this context, the thesis shall recommend that the tribunals should outsource the formulation and application of the principle of legitimate expectations from the general International law. The jurisprudence of the PCIJ/ICJ, and early international tribunals on legitimate expectations, estoppel, abuse of right, and acquiescence could provide a suitable framework for transposing evaluative elements to enrich investment treaty tribunals. In addition, specialized and mature regimes such as WTO Panels and Appellate Bodies, European Court of Justice and European Court of Human Rights have all dealt with the principle of legitimate expectations. The jurisprudence of such specialized regimes could aid investment treaty tribunals in reformulating the principle and applying it in investment treaty regime. Transposing and transplanting or cross fertilization among international adjudicative bodies is quite in tandem with the notion of 'unity of international law'. In this regard, article 31 (3) (c) of the VCLT provides for application relevant rules of international law applicable in relation to parties with a view to interpret international treaties and integrate other fields of international law relevant to the determination in dispute.<sup>366</sup>

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<sup>366</sup> United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html> [accessed 29 May 2014] (n 30).

## Chapter IV: Legitimate Expectations - *Legitimate Expectations under General International Law, and World Trade Organisation*

### 4.0 Introduction

*"A man may think he ought to fulfil a promise, but his thinking that he has an obligation cannot actually be the source of the obligation, if it was only honest men would be bound..."<sup>367</sup>*

(Atiyah)

As discussed in the preceding chapters, the principle of legitimate expectations is now well- entrenched in the jurisprudence of investment treaty arbitration. Most of the tribunals have gradually anchored their formulation and application of the principle under the broad International law concept of Good Faith.<sup>368</sup> In international law, as manifestation of good faith, the principle of legitimate expectations has been gradually developed by the PCIJ, ICJ, International Arbitral Tribunals, WTO dispute settlement bodies, European Union Courts, and the European court of Human rights. This gradual development came at a time when investment treaty regime is struggling to coherently formulate and apply the principle in its domain. Reflecting on the investment arbitration arbitral awards as alluded inter alia, their formulation and application of legitimate expectations is inchoate and

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<sup>367</sup> PS Atiyah, *Promises, Morals, and Law* (Clarendon Press 1981) 18.

<sup>368</sup> For instance in *Tecmed v Mexico* the tribunal held: '...in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.' See *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* ICSID Case No. ARB (AF)/00/2 (n 24) 54.



glaringly inconsistent. The tribunals have not adumbrated the content and the required elements needed in substantively relying on the principle. The importance of such elements can hardly be overstated, given the fact that the tribunals would have to appraise such elements before reaching a verdict whether legitimate expectations exists in a given fact or not, and whether it's been violated or not. The focus of this chapter is on the jurisprudence of legitimate expectations under general International law as a whole and WTO in particular. The underlying assumption of the chapter is to the effect that the jurisprudence of both general international law and WTO can provide guidance for investment treaty tribunals to formulate and apply the principle of legitimate expectations coherently. The Tribunals can learn and transpose certain evaluative principles used by the adjudicative and dispute settlement bodies of Permanent Court of International Justice (PCIJ), International Court of Justice (ICJ), International Tribunals, WTO panels and Appellate bodies. Thus, by engaging general international law where the principle of legitimate expectations is formulated and applied either directly or through its associated principles, a comprehensive and contextual account of the principle from the general international law, and WTO in particular could provide a basis for an integrative and systemic approach of transposing the needed content into investment treaty tribunals.

The chapter is divided into four broad headings. Section one briefly introduces the chapter as a whole; section two provides an overview of

‘expectation-protective’ principles under the general international law, and further dealt with the principles in detail. Section three provides an analytical account of the principle under WTO. Section four concludes with a way-forward towards an integrative approach.

#### **4.1 Legitimate Expectations under General International Law: An Overview of Related Principles**

The General conception of states as corporate entities under international law invariably necessitates that states operate through the medium of representation.<sup>369</sup> Various state officials and executive officers of states are considered capable of representing state and conveying state consent in the discharge of their official functions. Normally such conveyed consent leads to a mutual understanding between two or more states and eventually culminates into a binding agreement otherwise referred to as treaty. However, not all state consents are mutual, treaty based or even express. State representatives may function in a manner short of precise expression of mutual state consent, the nature of which may render state consent to be implied or assumed. Indeed, the problem with such functions (action or conduct) is how to attribute legal effect to it having contravened the traditional norm of attributing legal effect to state action or conduct. The agency through which states function and the consequent legal effect to it under general international law can be qualified under legitimate expectation

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<sup>369</sup> James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2012) 415.

or its associated principles of *abuse of right, acquiescence, equity, estoppel, good faith, reasonableness and unilateral declarations* all with a view to protect *legitimate expectations*. In this chapter, these principles shall be regarded as ‘expectation-protective’ due to their functional similarity, overlap, and more importantly choice for ‘ordering factor’<sup>370</sup>. One of the relevant works that swayed between these principles is Dr Slouka’s work on the International Custom and Continental Shelf.<sup>371</sup> According to Slouka;

*“...it is not important whether or not a term other than estoppel is used to describe the eventual consequences of a legal customary relationship of two or more states;...estoppel is an abstract embodiment of the international necessity and obligation of states to fulfil between themselves such expectations as each of them may have created in others by its actions or inactivity.”*<sup>372</sup>

D’Amato while commenting on Slouka’s work above, pointed out that Slouka upon discovering some connection among some of these principles, he later abandoned his finding on estoppel to “expectation-reliance” complex.<sup>373</sup> Michael Byers also alluded to the comprehensiveness of legitimate expectations to cover all the associated ‘expectation-related’ principles.<sup>374</sup>

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<sup>370</sup> D’Amato narrated how Dr Slouka abandoned his doctoral finding from estoppel to ‘expectation-reliance complex’. See: Anthony D’Amato, ‘Consent, Estoppel, and Reasonableness: Three Challenges to Universal International Law’ [2010] Faculty Working Papers 8 <<http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/102>>.

<sup>371</sup> Zdenek Slouka, ‘International Custom and the Continental Shelf; a Study of Some Aspects of the Growth of Customary Rules of International Law.’ (1965).

<sup>372</sup> Ibid 170–171.

<sup>373</sup> D’Amato (n 359).

<sup>374</sup> According to Byers ‘Certain, more specific rules of international law, such as the rules concerning estoppel and unilateral declaration, may be subsumed within the broader principle of legitimate expectation. “Estoppel” means that when one party relies on a misleading assurance or statement of intent from another party, and does so to its detriment,

The associated principles functioned in a manner geared towards protection of legitimate expectations.<sup>375</sup> The relationship between the principles is deeply entangled.<sup>376</sup> While some of the principles inclined more to providing basis and justification for recourse to the expectation related principles, some of the principles contain practical elements for protecting justified expectations. For instance, the principles of good faith,<sup>377</sup> equity,<sup>378</sup> and reasonableness have been considered as providing basis and justification for the application of acquiescence, estoppel and legitimate expectations.<sup>379</sup> According to the ICJ in **Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)**,:

*“...the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity. They are however based on different legal reasoning since acquiescence is*

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then that assurance or statement constitutes a legal wrong which gives rise to a legal obligation of specific performance or compensation. “Unilateral declaration” operates in a similar manner, but without the requirement of detrimental reliance. Under both rules States expect each other to behave in certain ways as a result of their behaviour, and failures to do so are treated as violations of international law.’ Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press 1999) 107.

<sup>375</sup> Robert Kolb, ‘Principles as Sources of International Law (With Special Reference to Good Faith)’ (2006) 53 *Netherlands International Law Review* 1, 20–24.

<sup>376</sup> Ian Sinclair, ‘Estoppel and Acquiescence’, *Fifty Years of International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press 1996) 104.

<sup>377</sup> Panizzon (n 12).

<sup>378</sup> Christopher R Rossi, *Equity and International Law: A Legal Realist Approach to the International Decisionmaking* (Transnational Publishers 1993).

<sup>379</sup> Stephen M Schwebel, *Justice in International Law: Selected Writings* (Cambridge University Press 2008) 603.

*equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion.”*<sup>380</sup>

One of the reasons for the relevance of such principles in the context of investor-state relationship could be seen from states’ reliance on such principles in the context of state-state relationship. States have been relying on these non-treaty (informal law making) principles to define/clarify their respective rights and duties, espouse claims on behalf of their citizens and undertake legal obligations. The premise under this heading is to the effect that much as international law can bind states on the basis of these principles that are descending,<sup>381</sup> non-consensual<sup>382</sup> or non-treaty principles ‘*as expressing states’ will*’ in the context of state-state relationship and dispute, then, such recognition could as well be extended by analogy to investor-state relationship and disputes. The basis for such an analogy from a legal positivistic perspective is the presence of a common denominator in both *state-state* and *state-investor* disputes. This common denominator is the existence of “*legal relationship and dispute*”<sup>383</sup> between legal entities recognised in law. While the issue of personality of the entities is settled under

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<sup>380</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgement*, [1984] ICJ Rep (ICJ) 305.

<sup>381</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 303–387.

<sup>382</sup> Koskenniemi (n 370).

<sup>383</sup> CH Schreuer, ‘What Is a Legal Dispute?’ (2009) 6 Transnational Dispute Management (TDM) <<http://www.transnational-dispute-management.com/article.asp?key=1356>> accessed 14 January 2014.

international law,<sup>384</sup> the centrality of the “entities” in this analogy may appear problematic given the vertical nature of the relationship between states and individual/corporations, in addition to the old-age dichotomy between subjects and objects in international law. Undoubtedly, only states have sovereign authority. Neither individuals nor corporations are saddled with sovereign functions.

However, from the prism of ‘Formalism’<sup>385</sup> and ‘participation’<sup>386</sup> the story can be narrated differently.<sup>387</sup> There is an undeniable evidence of horizontality in terms of the interaction among the global participants at the international level regardless of subjects/objects dichotomy, particularly at the adjudicatory or dispute level.<sup>388</sup> In addition, the wider perspective of

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<sup>384</sup> Fleur Johns, *International Legal Personality* (Ashgate Publishing Company 2010).

<sup>385</sup> Hans Kelsen pioneered the formal conception approach. According to Kelsen: ‘The traditional opinion that subjects of international law are only states, not individuals, that international law is by its very nature incapable of obligating and authorizing individuals, is erroneous. All law is regulation of human behaviour. The only social reality to which legal norms can refer are the relations between human beings. Hence, a legal obligation as well as legal right cannot have for its contents anything but the behaviour of human individuals. If, then, international law should not obligate and authorize individuals, the obligations and rights stipulated by international law would have no contents at all and international law would not obligate or authorize anybody to do anything.’ Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange, Ltd 2009) 341–343.

<sup>386</sup> The Participant conception is associated with Policy-Oriented approach to Law advocated by the New Haven School. According to ‘Participant Approach’ ‘A renewed emphasis upon the individual since the end of the Second World War has facilitated the access of more individuals to many organized constitutive arenas. Certain international tribunals, it may be noted, are open, as of right, to individuals.’ Myres McDougal, Harold Lasswell and W Michael Reisman, ‘The World Constitutive Process of Authoritative Decision’ [1967] Faculty Scholarship Series 273–274 <[http://digitalcommons.law.yale.edu/fss\\_papers/675](http://digitalcommons.law.yale.edu/fss_papers/675)>.

<sup>387</sup> Roland Portmann, *Legal Personality in International Law* (Cambridge University Press 2009) 173–208.

<sup>388</sup> As Higgins remarked in this context: ‘The topics of minimum standard of treatment of aliens, requirements as to the conduct of hostilities and human rights, are not simply exceptions conceded by historical chance within a system that operates as between states. Rather, they are simply part and parcel of the fabric of international law, representing the claims that are naturally made by individual participants in contradistinction to state-

invoking “expectation protective” principles under general international law and in the context of state-state arbitration lies in their relevance and in some cases necessity, due to the nature of their role in adjudication generally. In his seminal work on the function of law, while commenting on the principle of “abuse of right” Lauterpacht justifies the recourse to such principles due to the evolutive nature of international society and the resultant need to respond judicially to such evolvement.<sup>389</sup>

The development of Investment treaty arbitration where an individual as foreign investor can directly institute an action against sovereign state fits with societal changes contemplated by Lauterpacht. This area of law has witnessed the demise of espousal of claims through diplomatic protection and the emergence of foreign investors from mere ‘onlookers’ to actors in international law. Recently, the ICJ in **Diallo case (Guinea v Congo)**<sup>390</sup>

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participants.’ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995) 50.

<sup>389</sup> According to Lauterpacht ‘It is easy to see why in international Society, in which there is no authoritative legislative machinery adapting the law to Changed Conditions, there may be both frequent occasion and imperative necessity for the judicial creation of new torts through the express or implied recognition of a principle postulating the prohibition of abuse of rights.’ Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press 2011) 295.

<sup>390</sup> According to the ICJ: ‘...in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, and the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, which created an International Centre for Settlement of Investment Disputes (ICSID), and also by contracts between States and foreign investors. In that context, the role of diplomatic protection somewhat faded,...’ *Ahmadou Sadio Diallo (Republic of Guinea v Republic of Congo) Preliminary Objections, Judgment* [2007] ICJ Rep 582 (ICJ) [para 88].

confirmed the calibration of the status of foreign investors under international law pursuant to bilateral and multilateral investment treaties.

In this regard, equity, reasonableness, and good faith will not be treated separately here, as they relate more with foundational basis of legitimate expectations in which all the related principles could be accommodated than the practical application of legitimate expectations. Thus, discussion about them will be intersected with other principles as providing basis to the principles. In what follows, the section will examine the associated principles of *abuse of right, acquiescence, estoppel and unilateral declarations* with a view to discern their scope of application, constituent elements, and how they could enrich and complement in the formulation and application of the principle of legitimate expectations.

#### **4.1.1 Abuse of right (l'abus de droit)**

The doctrine of abuse of right (*abus de droit*) is summarised in the legal maxim **Neminem laedit qui suo jure utitur** ie nobody harms another when he exercises his own rights. It has been defined as “*exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another state.*”<sup>391</sup>

The doctrine is rooted in various domestic legal systems both of civil and

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<sup>391</sup> Alexander C. Kiss, ‘Abuse of Right’ in Rudolf Bernhardt, Rudolf L Bindschedler and Rudolf Dolzer, *Encyclopedia of Public International Law: History of International Law Foundations and Principles of International Law Sources of International Law Law of Treaties* (North-Holland 1984) 1.



common law origins. It later emerged at the international level through adjudication and further documentation in numerous treaties. Although, the precise juridical recognition of the principle is unclear as to whether the source of application is customary international law or general principle of law, the principle has been unanimously endorsed in various facets of international law as a sanction against *anti-social use* of legally conferred rights.<sup>392</sup>

International law recognises three broad scenarios or forms of abuse of rights. **First**, where a state in the exercise of its right permitted by law hinders another state from enjoying its right (also permitted by law) thereby causing injury to the later state. Cheng described the injury element ie “malicious injury” as the most important element thwarted against by the theory of abuse of right.<sup>393</sup> These form of abuse of right dictates weighing competing values as both parties have legal rights. Kiss opined that an abuse of right can be said to exist under this scenario where “...the injury suffered by the aggrieved state exceeds the benefit resulting for another state from the enjoyment of its own

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<sup>392</sup> Lauterpacht as one of the publicists and leading advocates of resorting to the principle in international adjudication captures the essence of the principle as follows: ‘The essence of the doctrine is that, as legal rights are conferred by the Community, the latter cannot countenance their anti-social use by individuals, that the exercise of a hitherto legal right becomes unlawful when it degenerates into an abuse of rights, and that there is such an abuse of rights each time the general interest of the community is injuriously affected as the result of the Sacrifice of an important social or individual interest to a less important, though hitherto legally recognised, individual right.’ Lauterpacht, *The Function of Law in the International Community* (n 378) 294.

<sup>393</sup> Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press 1994) 121.

right.”<sup>394</sup> In **North Atlantic Coast Fisheries Arbitration (United States v Great Britain)**<sup>395</sup> a typical exemplification of this form of abuse of right was arbitrated between United States and Great Britain. By virtue of the treaty of 1818 between Great Britain and United States, US citizens were granted fishing right in the territorial waters of Great Britain. Dispute arose as to among other things the interpretation of the nature and extent of the Regulatory powers of the Great Britain regarding activities in the waters visa via interference with the right of fishing of the US citizens. The tribunal having recognized the sovereign right of Great Britain to regulate held that exercise of such right must be in Good Faith and fairness to both local and American Fishermen.<sup>396</sup>

Secondly, another scenario of abuse of right is where a state exercises its right in contradistinction to the purpose for which the right was legally allowed to be exercised thereby causing injury to another state. Cheng described this

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<sup>394</sup> Alexander C. Kiss, ‘Abuse of Right’ in Bernhardt, Bindschedler and Dolzer (n 380) 1.

<sup>395</sup> *North Atlantic Coast Fisheries Tribunal of Arbitration Constituted under a special Agreement signed at Washington, January 27th between The United states of America and Great Britain, The Hague* PCIJ 104 (PCIJ).

<sup>396</sup> According to the tribunal: ‘The right of Great Britain to make regulations without the consent of the United States, as to the exercise of the liberty to take fish referred to in Article 1 of the Treaty of October 20th, 1818, in the form of municipal laws, ordinances or rules of Great Britain, Canada or Newfoundland is inherent to the sovereignty of Great Britain. The exercise of that right by Great Britain is, however, limited to the said Treaty in respect of the said liberties therein granted to the inhabitants of the United States in that such regulations must be made bonafide and must not be in violation of the said Treaty. Regulations which are (1) appropriate or necessary for the protection and preservation of such fisheries, or (2) desirable or necessary on grounds of public order and morals without unnecessarily interfering with the fishery itself, and in both cases equitable and fair as between local and American fishermen, and not so framed as to the obligation to execute the Treaty in good faith, and are therefore reasonable and not in violation of the Treaty.’ Ibid 16.

scenario as “fictitious or malicious exercise of a right”.<sup>397</sup> The scenario entails instances where states are deliberately evading their treaty obligations or using exceptional/derogatory permissions to seize away an entire right under the guise of functioning within the exceptional ambit of the law. For instance, where law permits state to adopt certain discriminatory measures in the event of protecting essential security of a state, any use of such right under the guise of protecting security interest, albeit contrary to the stated purpose by violating people’s right will amount to abuse of right. These kind of abuses are more likely to be found in the fields of human rights and international economic law, both trade and investment inclusive. In **Free Zones of upper Savoy and District of Gex**<sup>398</sup> a dispute arose between France and Switzerland regarding among other things tax levy in the French frontier that was agreed to be free from custom barrier. France in the discharge of the obligation to maintain its frontier had instituted police cordon and further claimed to be entitled to levy importation tax. Switzerland on the other hand challenged such levy as mere customs tax in disguise, and therefore asked the court to decide on what taxes may legitimately be imposed at the frontier. The Court while recognising the French sovereign right to establish the control cordon and levy importation tax other than fiscal tax remarked that “*A reservation must be made as regards abuses of a right, since it is certain that France must not evade the obligation to maintain the zones by erecting a customs barrier under the*

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<sup>397</sup> Cheng (n 382) 122.

<sup>398</sup> *Free Zones of Upper Savoy and District of Gex ( France v Switzerland)* (1932) No. 46 Ser AB 96 (PCIJ).

*guise of a control cordon.*"<sup>399</sup> The Court further provided some of the limitations of the principle, that there can be no presumption of abuse of right.<sup>400</sup>

The third scenario of abuse of right is where a state arbitrarily exercised its right thereby injuring another party. This form of abuse of right usually occurs in the exercise of discretionary powers and other related administrative functions of state by state apparatus or officials. Notable cases under this scenario include cases of expulsion of aliens, and other forms of arbitrary, and unfair exercise of legally recognised rights. Most often, the discriminatory and unfair dimension of this scenario affects foreigners more, thereby becoming victims of such administrative functions. The dictates of fairness and equitable dealings certainly requires certain legal safeguards in protecting and ensuring that foreigners either individuals or businesses have not been subjected to capricious and arbitrary use of legal rights or discretions.<sup>401</sup> In **Boffolo case**<sup>402</sup> the tribunal was confronted with the allegation of arbitrary expulsion of Boffolo by the Venezuelan authorities contrary to the laws of Venezuela. It was established before the tribunal that Boffolo had actually lost his Venezuelan domicile having lived earlier for two years outside Venezuela, in addition to being prejudicial to public order. The

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<sup>399</sup> Ibid 225.

<sup>400</sup> Ibid 12.

<sup>401</sup> Todd Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* (Martinus Nijhoff Publishers 2013) 305–320.

<sup>402</sup> *Boffolo Case* (1903) X Rep Int Arbitr Awards 528 (Italy-Venezuela Mixed Claims Commission) 528.

tribunal decided in favour of Venezuela recognising the Venezuelan general right of expulsion. The tribunal however remarked that:

*"A state possesses the general right of expulsion; but,...(e)xpulsion should only be resorted to in extreme instances, and must be accomplished in the manner least injurious to the person affected. ...The Country exercising the power must, when occasion demands, State the reason of such expulsion before an international tribunal, and an inefficient reason for none being advanced, accepts the consequences."*<sup>403</sup>

*a. Elements of Abuse of Right:*

Flowing from the three scenarios above, the constituents of a successful plea for abuse of right need to satisfy the following elements;<sup>404</sup>

1. Existence of the right
2. Exercising the right
3. Damages or Injury
4. Causation (causation between the abused right and the injury suffered).

The first element is a mandatory requirement in establishing abuse of right. It requires that a legal right pursuant to which state functions must exist in law. Usually such rights are either attributes of state sovereignty or conferred on states through international treaties. For instance, in **Free Zones of upper**

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<sup>403</sup> Ibid 537.

<sup>404</sup> Thomas Cottier, *The Challenge of WTO Law: Collected Essays* (Cameron May 2007) 128–129.

**Savoy and District of Gex**<sup>405</sup> clearly the tribunal recognised the regulatory powers of France as an attribute of French sovereignty.<sup>406</sup>

The second element requires that the state must exercise the legal right. This element can be satisfied if it can be shown that the state expresses such right either in form of action or conduct.<sup>407</sup> It must be pointed out that the exercise of the right in itself is *prima facie* legal. However, the manner, purpose and nature of such an exercise are the tipping points as to whether there is excess, arbitrariness as a prelude to qualify as an abuse. In **Fur Seal Arbitral Tribunal**,<sup>408</sup> One of the Arbitrators Sir Charles Russell likened the element of the “exercise of legal right” in isolation with “*Damnum*” without “*injuria*” incapable of providing a cause of action. Indeed, malice and other “bad-intent” related expressions could characterise the exercise of the right and if established, render the exercise as “abuse”. The determination of malice and similar qualifiers may in many instances require proof of intention of the entity exercise of the legal right. The PCIJ In **German Interests Case**<sup>409</sup> decided that abuse of right cannot be presumed, rather “...it rests with the party who states that there has been such misuse to prove his statement.”<sup>410</sup> The justification in rejecting presumption and requiring proof of intention in

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<sup>405</sup> *Free Zones of Upper Savoy and District of Gex (France v. Switzerland)* (n 387).

<sup>406</sup> *Ibid* 12.

<sup>407</sup> *Cottier* (n 393) 129.

<sup>408</sup> *Behring Fur Seal Arbitration (Great Britain v USA)* (1893) 1 Int Arbitr 755.

<sup>409</sup> *German Interests in Polish Upper Silesia (Germany v Poland)* (1925) 1926 Ser A (PCIJ).

<sup>410</sup> *Ibid* 88.

characterising malicious actions and inaction is clearly due to the actual legitimacy of such actions or inactions.<sup>411</sup>

The third element is damages or injury. This element has been considered by courts and tribunals as one of the crucial elements in establishing abuse of right. In **German Interests case**,<sup>412</sup> It was held that two crucial elements of the doctrine of abuse of right are the existence of the right and, damage or injury resulting from the exercise of such right. By way of definition, the damage or injury refers to “...an intrusion of one actor’s ability to fully enjoy the benefits of, or to fully exercise, her own rights.”<sup>413</sup> The consequence of such damage or injury would entail international wrong thereby rendering the state against which the action is filed wanting from the lens of international responsibility.<sup>414</sup> The injury could be either material or moral as is generally recognised in international law.<sup>415</sup> However, there is no general yardstick for determining the threshold of damage or injury, as it depends on the legal regime involved.<sup>416</sup>

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<sup>411</sup> According to Iluyomade: ‘...because no initial wrongful act is involved in a complaint of abuse of right, intention is a necessary element of the claim, distinguishing the situation of an unfortunate consequence of a legitimate exercise of right.’ BO Iluyomade, ‘Scope and Content of a Complaint of Abuse of Right in International Law’ (1975) 16 Harvard International Law Journal 47, 77.

<sup>412</sup> *German Interests in Polish Upper Silesia (Germany v Poland)* (n 398).

<sup>413</sup> Cottier (n 393) 129.

<sup>414</sup> Iluyomade (n 400) 76.

<sup>415</sup> Ibid 75.

<sup>416</sup> Cottier (n 393) 129.

Lastly, the party alleging abuse of right must show causal connection between the injuries or damages suffered and the abusive exercise of the legal right. The causation element is closely connected with the element of damages. Generally, causation is qualified as 'proximate', 'effective' etc. <sup>417</sup> In **Lalane and Ledour Case**<sup>418</sup> the causation element took the form of Custom officer's refusal to permit shipment of cattle meat to Guayana by detaining ship in a harbour for days which caused the ship to eventually depart without the cattle meat, leading to substantial damages. Indeed, it was established before the tribunal earlier that the reason for the refusal was "fictitious/malicious" contrary to the stated sanitary motive.

#### 4.1.2 Acquiescence

The principle of acquiescence is another corollary to legitimate expectations. Acquiescence is summed in the legal maxim **Qui tacet consentire videtur si loqui debuisset ac potuisset**. It entails that by silence and inaction state can be committed legally and be held to account. Historically, acquiescence as a substantive legal principle originated from common law system, before gradually becoming recognised in international law through adjudication. Acquiescence is generally viewed as an exception to the formal rule that states

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<sup>417</sup> According to Cheng: '...the principle of integral reparation in responsibility has to be understood in conjunction with that of proximate or effective causality....the duty to make reparation extends only to those damages which are legally regarded as the consequences of an unlawful act. These are damages which would normally flow from such an act, or which a reasonable man in the position of the wrongdoer at the time would have foreseen as likely to result, as well as all intended damages.' Cheng (n 382) 253.

<sup>418</sup> *Lalanne and Ledour Case* (1902) x Rep Int Arbitr Awards 17 (French-Venezuela Mixed Claims Commission).



are bound only by rules they consented to positively under international law.<sup>419</sup> In circumstances where positive reaction of states is required to demonstrate their objections, silence by states may be negatively construed against the states. The purpose of the principle as argued by the commentators is to prevent states from playing “hot and cold”, “fast and loose” or approbating and reprobating against other states.<sup>420</sup> The principle functions in circumstances that are less clear or vague, where no crystal and definite right can be manifestly relied upon.

International courts and tribunals have applied the principle directly and indirectly. In one of the earlier cases in which the principle features, ie the **Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v US)**<sup>421</sup> The ICJ defined acquiescence as “... *equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent,...*”<sup>422</sup>

*a. Functions of Acquiescence:*

The general function of acquiescence is to preclude a state that acquiesced from asserting or denying a particular claim on the ground that the state is deemed to have abandoned such a claim. Functionally the doctrine is closely related with consent. Publicists have controverted over the exact function of

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<sup>419</sup> Byers (n 18) 106.

<sup>420</sup> Kaiyan Homi Kaikobad, *Interpretation and Revision of International Boundary Decisions* (Cambridge University Press 2007) 211.

<sup>421</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgement*, (n 369) [130].

<sup>422</sup> *Ibid.*

acquiescence. For instance McGibbon was of the view that “the function of acquiescence may be equated with consent...”<sup>423</sup> McGibbon’s view is underpinned by legitimacy concern of holding states to account on the basis of acquiescence. Therefore, once the function of acquiescence is defined as consent, it solves the problem of challenging the legality of invoking the principle, because due to the absence of international legislators, consent functions as a gap-filler and in a manner akin to a legislative process.<sup>424</sup> However Byers disagrees with the idea of describing acquiescence as consent particularly in the context of customary international law.<sup>425</sup>

One of the cases in which ICJ illustrates on the application and function of acquiescence is **Temple of Preah Vihear (Cambodia v Thailand)**.<sup>426</sup> The ICJ was presented with the issue of boundary dispute regarding sovereignty over the region where temple of Preah is situated. Both Cambodia and Thailand are claiming sovereignty over the region including the temple. The dispute had its root in the treaty of 1904 between Thailand (then called Siam) and France being the protecting power of Cambodia. The treaty provides that boundaries between Cambodia and Thailand should follow watershed and be

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<sup>423</sup> IC MacGibbon, ‘Scope of Acquiescence in International Law, The’ (1954) 31 British Year Book of International Law 143, 145.

<sup>424</sup> Ibid.

<sup>425</sup> According to Michael Byers ‘the word consent is not particularly accurate description of the role of acquiescence in the customary process. Acquiescence often signifies ambivalence or even apathy to the rule in question than a conscious support for the rule on the part of the acquiescing state.’ Byers (n 18) 106.

<sup>426</sup> *Case concerning the Temple of Preah Vihear (Cambodia v Thailand) Merits*, [1962] ICJ Rep p. 6.

delimited by a mixed Commission. During the work of the Commission maps were drawn on the instruction of Siamese (Thailand) authorities by some French Officers. In the map, the temple of Preah falls on the Cambodian side. Of relevance, Cambodia relied on the principle of acquiescence. According to Cambodia, since the production of the map in 1909 which places the temple on its side, Thailand by its actions and conducts had accepted the map, and had never raised any query or protest prior to 1958. Thailand on its part rejected this submission and argued among other things that, the map produced was never approved by the boundary commission, never accepted by Thailand or alternatively was accepted in error. The Court narrowed the submissions on acquiescence to the following formulation;

*"...whether parties did adopt the annex 1 map, and the line indicated on it, as representing the outcome of the work of delimitation of the frontier in the region of Preah Vihear, thereby conferring on it a binding character."*<sup>427</sup>

First, although it was established before the court that the mixed commission never approved the map, however, the maps were drawn on the instruction of Siamese authorities (Thailand). Secondly, It was also established that upon production of the map, the Siamese authorities had by their conduct accepted and acknowledged receipt of the maps. Because the circumstance under which the maps were handed over to Thailand call for protest (if any) from

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<sup>427</sup> Ibid 22.

Thailand to which none was made.<sup>428</sup> Thirdly, the court rejected Thailand's argument that it erroneously accepted the map not knowing the map in itself contained error.<sup>429</sup>

In view of the foregoing, the court concluded that Thailand must be precluded from asserting claim to the temple and rejecting the map that places the temple on the Cambodian side.

*b. Elements of Acquiescence:*

There are certain essential elements that must be satisfied in any successful plea of acquiescence. These elements are as follows:

1. Silence or toleration:

Any state invoking the principle of acquiescence must show that the state against whom the principle is sought to be applied must have failed to assert its claim or was silent in respect of its claim. This element is closely tied to the nature of acquiescence as exhibition of reluctance or inaction. In **Temple of Preah**<sup>430</sup> supra, the court held that Thailand must be held to have acquiesced

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<sup>428</sup> According to the court: '...it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. Qui tacet Consentire Videtur si loqui debuisset ac potuisset.' Ibid 23.

<sup>429</sup> 'It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error...'ibid 26.

<sup>430</sup> *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) Merits*, (n 415).

their claim to sovereignty over the region in dispute due to their silence and acceptance of the map which showed the region as part of Cambodia.

2. The silence must have extended over a period of time:

One of the essential elements of acquiescence is that the inaction or silence forming the basis of acquiescence must last for a considerable period of time. No time limit has been sanctioned by courts or tribunals. In *The Fisheries Case*<sup>431</sup> the ICJ considered a toleration of over sixty years by United Kingdom. In *Grisbadarna Arbitration (Norway v Sweden)* however, the tribunal held in favour of Sweden that Norway acquiesced over Sweden's exercise of "...various acts in the Grisbadarna region...owing to her conviction that the regions were Swedish..."<sup>432</sup> Therefore, Norway was held to have acquiesced, even though the lack of protest was for a short period of time.

3. The Circumstance must have required action:

In *Temple of Preah Vihear* The ICJ confirmed the relevance of circumstance as a crucial element in the determination of acquiescence where the court held that "...the circumstances were such as called for some reaction, within a reasonable period..."<sup>433</sup> Indeed, not in all circumstances are states required to protest or assert a claim. The requirement of 'circumstance' is crucial, albeit the determination of such circumstance is far from easy. One of the likely instances where action may not be required in law is where the party against whom acquiescence is

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<sup>431</sup> *Fisheries Case United Kingdom v Norway* [1951] ICJ Rep 116 (ICJ).

<sup>432</sup> *Grisbadarna Case (Norway v Sweden)* [1909] Hague Court Rep 120 (PCA).

<sup>433</sup> *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) Merits*, (n 415).

sought to be invoked was unaware of the subject matter in dispute, or the subject matter is under negotiation between the parties. In *Fisheries case* (supra), the ICJ elaborated on the knowledge and awareness United Kingdom had about the activities of Norway in the disputed area to an extent that the circumstance required a protest from United Kingdom or any other interested party. According to the court: *"The notoriety of the facts, the general toleration by international community,...would in any case warrant Norway's enforcement of her system against the United Kingdom."*<sup>434</sup>

In Summary, acquiescence like the principle of abuse of right discussed earlier is relevant in situations where the rules as contained in a treaty or custom are ambiguous or less specific. The application of the principle in adjudication could therefore clarify such ambiguity or bridge the gap by providing a criterion for interpreting the ambiguity or resolving the claim. It can be said that acquiescence (and other associated principles) are playing two significant roles in adjudication namely, Interpretive (Evidentiary) and Substantive roles. In both, the function of acquiescence is to protect the expectation of the aggrieved state (s) whose creation was due to the inaction or silence of the state against whom the principle is invoked. As highlighted in the context of boundary disputes, the principle is very illuminating, solidly grounded in general international law, and its elements could aid in reformulation of legitimate expectations.

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<sup>434</sup> *Fisheries Case United Kingdom v. Norway* (n 420).

### 4.1.3 Estoppel

The principle of estoppel is summed in a maxim (*Allegans contraria non audiendus est*), ie “He is not to be heard who alleges things contradictory to each other”. Estoppel is analogous to acquiescence in most respect, as both estoppel and acquiescence interact in an overlapping manner. The origin of estoppel like most of other international law principles has its root in domestic legal systems.<sup>435</sup> Later, it finds its way into international sphere through international adjudication. The juridical basis of the principle under international law is not very clear. Considerable number of publicists considered the principle as part of ‘general principles of law’,<sup>436</sup> while few have advanced the argument on the customary law origin of the principle.<sup>437</sup> This section does not intend to engage with the discussion of the juridical sources of the doctrine. It suffices to acknowledge that recourse to the principle has been made in numerous occasions by the Permanent Court of International Justice, International Court of Justice and other International Courts and Tribunals.

In discerning the precise meaning and scope of the principle, commentators linked the principle with notions of consistency, stability and coherence in the

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<sup>435</sup> Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (Lawbook Exchange 2002) 204.

<sup>436</sup> Crawford, *Brownlie's Principles of Public International Law* (n 358) 420.

<sup>437</sup> Georg Schwarzenberger, ‘The Fundamental Principles of International Law’, *Recueil des Cours, Collected Courses, Volume 87* (2007) (Martinus Nijhoff Publishers) 312 <[http://nijhoffonline.nl/book?id=er087\\_er087\\_191-385](http://nijhoffonline.nl/book?id=er087_er087_191-385)> accessed 27 January 2014.

conduct of state affairs. For instance, Macgibbon described the principle as a “...requirement that a state ought to be consistent in its attitude to a given factual or legal situation.”<sup>438</sup> Bowett also described estoppel as a principle that “operates so as to preclude a party from denying before a tribunal the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit.”<sup>439</sup> One of the thorny issues in demarcating the scope of estoppel is the oscillation in the conception between international law sphere and domestic law root of the principle.<sup>440</sup> Uncontestably, the principle has its roots in domestic law, but its varied classifications under domestic law can hardly be accommodated under international law *mutatis mutandis*. For instance, under domestic legal systems particularly English legal systems, estoppel has been classified into various forms such as estoppel by representation, record, deed, res judicata, silence, promissory estoppel, etc. Transposing such varied classifications into international law may result in an exercise in futility.<sup>441</sup>

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<sup>438</sup> Ic MacGibbon, ‘Estoppel in International Law’ (1958) 7 International & Comparative Law Quarterly 468, 468.

<sup>439</sup> DW Bowett, ‘Estoppel before International Tribunals and Its Relation to Acquiescence’ (1957) 33 British Year Book of International Law 176, 176.

<sup>440</sup> ‘...in Anglo-American municipal law estoppel is a highly complex, multifarious theory with numerous forms and different theoretical moorings that apply vastly in different circumstances...’ See: Christopher Brown, ‘Comparative and Critical Assessment of Estoppel in International Law, A’ (1995) 50 University of Miami Law Review 369, 371.

<sup>441</sup> As judge Alfaro remarked in his separate opinion of Temple of Preah case as follows: ‘...there is a very substantial difference between the simple and clear-cut rule adopted by and applied in the international field and the complicated classifications, modalities, species, sub-species and procedural features of the municipal system.’ *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand) Merits, (Separate Opinion of Vice-President Alfaro)* ICJ Rep 39 (ICJ).



While it is difficult to delineate the precise scope of estoppel due to the overlap with other similar principles, it can be reiterated that the principle of estoppel requires that '*a state ought to maintain towards a given factual or legal situation an attitude consistent with that which it was known to have adopted with regard to the same circumstances on previous occasions*'.<sup>442</sup>

**a. Functions of Estoppel:**

The main function of estoppel is to prevent a party from benefitting from its incoherence or inconsistency, to the detriment of another party who in good faith relies on the express or implied representation or conduct of the first party. Estoppel functions both as evidentiary and substantive principle. The function of estoppel as an evidentiary principle is aimed at complementing substantive claims thereby confirming substantive principles in a procedural manner. According to Judge Lauterpacht the '*doctrine of estoppel is prima facie a private law doctrine forming part of the law of evidence*.'<sup>443</sup> This rather, limited function of estoppel is said to have constitute an obstacle into the early recognition of the principle in international law.<sup>444</sup>

On the other hand, estoppel functions mostly in substantive capacity under international law. As a substantive stand-alone principle, it functions to promote stability, coherence and consistency. The substantive function of

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<sup>442</sup> MacGibbon (n 427) 512.

<sup>443</sup> Lauterpacht, *Private Law Sources and Analogies of International Law* (n 424) 203.

<sup>444</sup> MacGibbon (n 427) 478.

estoppel is confirmed in **Argentine – Chile Frontier case**,<sup>445</sup> where the Court of arbitration held that “...there is in international law a principle, which is moreover a principle of substantive law and not just a technical rule of evidence,...this principle is designated by a number of different terms, of which “estoppel” and “preclusion” are the most common.”<sup>446</sup>

The substantive applications of estoppel under international law may have the effect of producing following scenarios:

- a. Barring a state from pleading its default as a justification to avoid its international obligations.<sup>447</sup>
- b. Estopping a state from denying what it had earlier recognised or admitted.<sup>448</sup>
- c. Estopping a state from avoiding obligations incidental to the exercise of a right it had earlier asserted.<sup>449</sup>
- d. Estopping a state from insisting on a claim it objected to earlier.<sup>450</sup>
- e. Barring a state from questioning the legality of a claim it has asserted or claim.<sup>451</sup>

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<sup>445</sup> *Argentina - Chile Frontier Case* (1966) XVI RIAA 109.

<sup>446</sup> *Ibid* 164.

<sup>447</sup> *MacGibbon* (n 427) 480.

<sup>448</sup> *Ibid* 482.

<sup>449</sup> *Ibid* 495.

<sup>450</sup> *Ibid* 496.

<sup>451</sup> *Ibid* 497.

In the arbitral award by the **King of Spain ie Honduras v Nicaragua**,<sup>452</sup> Nicaragua challenged the 1906 arbitral award made by the King of Spain on the ground of incompetency of the arbitrator. Honduras on the other hand argued that since Nicaragua had earlier accepted the appointment of King of Spain as the arbitrator, it is no longer open to Nicaragua to challenge the competency of the arbitrator relying on the estoppel scenario. The ICJ agreeing with Honduras held as follows:

*“...Nicaragua, by express declaration and by conduct, recognized the Award, as valid and it is no longer open to Nicaragua to go back upon that recognition and challenge the validity of the Award. Nicaragua’s failure to raise any question with regard to the validity of the Award for several years after the full terms of the Award had become known to it further confirms the conclusion at which the Court has arrived...”*<sup>453</sup>

#### **b. Elements of Estoppel:**

From the jurisprudence of PCIJ, ICJ, and early International Arbitral Tribunals, a plea for estoppel must satisfy the following elements:

##### **i. Representation/Conduct**

An estoppel may emanate from a representation or silence of the person against whom the principle is invoked. Here, representations or conduct capable of being relied upon must be unambiguous, unconditional voluntary and authorised. In **Serbian Loans Case** the PCIJ clearly refused to uphold a plea for estoppel on the ground that “...there has been no clear and

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<sup>452</sup> Case concerning the Arbitral Award made by the King of Spain on 23 December 1906 [1960] ICJ Rep 192 (ICJ).

<sup>453</sup> Ibid 213.

unequivocal representation.” The ICJ in **Land and Maritime Boundary between Cameroun and Nigeria**<sup>454</sup> reiterated the essential conditions for a successful plea of estoppel as follows:

*“An estoppel would only arise if by its acts or declarations Cameroun had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the court by bilateral avenues alone. It would further be necessary that by relying on such an attitude Nigeria had changed position to its own detriment or had suffered some prejudice.”*<sup>455</sup>

In the **Advisory Opinion on the European Commission of the Danube**<sup>456</sup> the PCIJ provided a framework for conditional representations. According to the Court, such conditional representations are not binding except where such conditions have been otherwise fulfilled.<sup>457</sup> Same conclusion was reached in *Eastern Greenland case (Denmark v Norway)*<sup>458</sup> where the court described the Ihlen declaration as binding on the ground that it was definite and ‘unconditional’.<sup>459</sup>

## ii. Reliance

International courts and tribunals have consistently recognized reliance as a cardinal element in estoppel. Reliance entails that a state relying on estoppel

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<sup>454</sup> *Land and Maritime Boundary between Cameroon and Nigeria, (Cameroon v Nigeria: Equatorial Guinea intervening), Preliminary Objections*, [1998] ICJ Rep 275 (ICJ).

<sup>455</sup> Ibid 275.

<sup>456</sup> *Jurisdiction of the European Commission of the Danube between Galatz and Braila (Advisory Opinion)* [1927] PCIJ XII:I, Series B No. 14 6.

<sup>457</sup> Ibid 35.

<sup>458</sup> *Legal Status of Eastern Greenland Case (Denmark v Norway) Judgement* (1933) Series A/B 53, 22 (PCIJ).

<sup>459</sup> Ibid 72.

must show evidence of such reliance on a particular representation or conduct. This requirement is considered by many commentators as the cornerstone of estoppel and the bridge between estoppel and good faith principle.<sup>460</sup> In other words, good faith is regarded as the root upon which estoppel rests.<sup>461</sup> The element of reliance is further gauged with 'detriment' or 'prejudice' requirement. This ad up results in the connotation of 'detrimental reliance' which simply qualifies reliance in estoppel to mean reliance that breeds prejudice or detriment upon disappointment. The test for determining 'detrimental reliance' is said to be satisfied if it can be shown that a distinct act was undertaken by a party in reliance on a representation which could either be to the detriment of the party relying or to the benefit of the maker of the representation. In *Temple of Preah Vihear*<sup>462</sup> Judge Fitzmaurice in his separate opinion captures the relevance of reliance as follows:

*"The essential condition of the operation of the rule of preclusion or estoppel, as strictly to be understood, is that the party invoking the rule must have "relied upon" the statements or conduct of the other party, either to its own detriment or to the other's advantage."*<sup>463</sup>

In similar vein, the Court in the **North Sea Continental Shelf Cases**<sup>464</sup> while rejecting an estoppel scenario plea hypothesise the view that an estoppel

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<sup>460</sup> Bowett (n 428) 193.

<sup>461</sup> James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2012) 420.

<sup>462</sup> *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand) Merits, (Separate Opinion of Judge Fitzmaurice* [1962] ICJ Rep 52 (ICJ)).

<sup>463</sup> *Ibid* 63.

<sup>464</sup> *North Sea Continental Shelf Cases* [1969] ICJ Rep 3 (ICJ).

scenario could emerge in the case, if it can be shown that Germany had by an earlier representation or conduct relied upon by Denmark or Netherlands, the later detrimentally changed their respective positions and suffer some prejudice.<sup>465</sup> The absence of such ingredients made the plea to fail. In **Serbian Loans Case**,<sup>466</sup> the PCIJ also rejected estoppel plea as lacking in fulfilling reliance element. The Court held that *"There has been no change in position on the part of the debtor State."*<sup>467</sup>

In addition to the aforementioned authorities, it must be pointed out that although there is unanimity in the recognition of 'reliance' as an element of estoppel, on the other hand there is a view that does not recognise 'detrimental reliance or prejudice' as a necessary element of estoppel. The proponents of this view alluded to the implied absence of 'detrimental reliance' in some of the cases considered above to justify their view. As one of the commentators argued, *"...there is no reason, in International law, to look for reliance by the other party; neither case law nor State Practice requires consideration of this kind."*<sup>468</sup> Indeed, a reconciliatory approach appear to advocate a distinction between 'estoppel' which requires 'detrimental reliance' as an essential element, and 'unilateral actions' or 'promises' which does not require 'detriment'. Whether there is truly clear-cut distinction between both 'estoppel' and 'promises' is clearly outside the purview of this work. It is

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<sup>465</sup> Ibid 30.

<sup>466</sup> *Case Concerning the Payment of Various Serbian Loans issued in France, Judgement of 12 July 1929, Ser 20 4 (PCIJ).*

<sup>467</sup> Ibid 39.

<sup>468</sup> Kaikobad (n 409) 223–224.

incontestable however, that the terminologies deployed by counsel in their pleadings, or the courts and tribunals in their judgements and awards respectively are far from being consistent. **Justice Alfaro** recognising the judicial approach of not placing much importance to the forms but the substance of the principles put to rest the imaginary distinction as follows:

*“Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a state, and its previous conduct in connection therewith, is not admissible (allegans contraria non au-diendus est). Its purpose is always the same: a state must not be permitted to benefit by its own inconsistency to the prejudice of another state (nemo potest mutare consilium suum in alterius in-juriam). A fortiori, the state must not be allowed to benefit by its inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its right or prevented from exercising it. (Nullus commodum Capere de sua injuria propria.) Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right. (venire contra factum proprium non valet).”<sup>469</sup>*

#### 4.1.4 Unilateral Actions

The term unilateral actions/conduct, or statements is an umbrella to various manifestations of state actions. These actions include protests, notifications, declarations, renunciations, promises, and waiver. The diverse methods through which states manifest their unilateral actions are said to be the source of difficulty in defining unilateral actions.<sup>470</sup> Despite the absence of a comprehensive definition, the principle remains one of the most important

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<sup>469</sup> *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand) Merits, (Separate Opinion of Vice-President Alfaro)* (n 430) 40.

<sup>470</sup> ‘Unilateral Acts in International Law, in R. Bernhardt (ed.) *Encyclopedia of Public International Law*’, vol Vol. 7 (North-Holland 1984) 518.

principles in international law.<sup>471</sup> Brownlie has identified two prominent forms of unilateral actions. The First one is unilateral action or conduct in the formation of customary rules, while the second one is in form of recognition covered by the law of recognition. To this end, Brownlie questioned the aspect of ILC approach that seeks to incorporate all other forms of state actions such as protest, promise, and renunciation e.t.c as part of unilateral actions. According to Brownlie, distinguishing the forms is necessary to avoid obscuring legal relations.<sup>472</sup> On the other hand, the ILC work in this area has provoked deeper inquiry into the area,<sup>473</sup> and brought about some coherence in the fragmented manifestations of unilateral actions.<sup>474</sup> As it is evident, states had for long been relying on various forms of unilateral actions, to express their own decisions. These actions “...take various forms, display a great variety of contents, and pursue different aims.”<sup>475</sup> To that extent, states are bound by their unilateral actions or conduct due to the impact such actions or conduct has in relations among states. States that are likely to be affected by such unilateral actions or are simply interested in such actions ‘may take cognizance...and place confidence in them and are entitled to require that the obligation thus created be respected’.<sup>476</sup> The freedom of states to place confidence

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<sup>471</sup> Malcolm N Shaw, *International Law* (Cambridge University Press 2008) 121–122. Crawford, *Brownlie’s Principles of Public International Law* (n 450) 416–419.

<sup>472</sup> Crawford, *Brownlie’s Principles of Public International Law* (n 358) 416.

<sup>473</sup> Christian Eckart, *Promises of States under International Law* (Hart publishing 2012).

<sup>474</sup> Michael Wood, *The International Law Commission: 1999-2008*. (Oxford University Press 2010) 547–560.

<sup>475</sup> Mohammed Bedjaoui, *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers 1991) 221.

<sup>476</sup> *Nuclear Tests (New Zealand v France) Judgement*, [1974] ICJ Rep 457 [49].



on the action or conduct of each other is what renders unilateral action an “expectation-protective” principle. One of the plausible explanations given in considering unilateral action as binding is the recognition of such actions as an expression of the will of the state making the action or the statement.<sup>477</sup> According to some commentators, unilateral actions can be regarded as a direct formal source of obligation against the actor state.<sup>478</sup>

By way of definition, Unilateral actions are “declarations publicly made and manifesting the will to be bound” by states the basis upon which other states concerned with the action may rely on such actions and demand their fulfilment. The ILC definition of unilateral actions is undoubtedly inspired by the decisions of ICJ.<sup>479</sup> In **Nuclear Tests case** the Court while determining the status and scope of unilateral declarations seized the opportunity to design a comprehensive regime of unilateral actions under international law.

According to the Court:

*“...declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking*

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<sup>477</sup> Camille Goodman, ‘Acta Sunt Servanda - A Regime for Regulating the Unilateral Acts of States at International Law’ (2006) 25 Australian Year Book of International Law 43, 47.

<sup>478</sup> Anneliese Quast Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (Martinus Nijhoff Publishers 2012) 145.

<sup>479</sup> Wood (n 463) 552.

*of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding....*"<sup>480</sup>

It is instructive to note that the ICJ's definition does not restrict the forms of unilateral actions but rather provided a guideline for their identification and qualification. This approach underscores the emphasis placed by the court on the legal basis of the principle and its constituent elements, than formal categorization. It is therefore not surprising that the ILC in its work also adopted the criteria-driven approach. Thus, it matters less, whether it is called unilateral 'act' or 'conduct', 'actions' or 'declarations', 'promises' or 'undertakings', 'waiver' or 'renunciation' provided the basis of such declaration, action or conduct, satisfies the fundamental criteria of unilaterality and manifestation of will of the state concerned as part of an '*international legal act*'.

#### **a. Elements of Unilateral Actions:**

##### **i. Unilaterality (Form):**

Generally, form is immaterial as there is no specified form in which a unilateral action must conform with.<sup>481</sup> In the **Nuclear Tests case**, ICJ unequivocally confirms the irrelevance of form in unilateral actions.

According to the Court:

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<sup>480</sup> *Nuclear Tests (New Zealand v. France) Judgement*, (n 465) [46].

<sup>481</sup> Carlos Fernández de Casadevante Romani, *Sovereignty and Interpretation of International Norms* (Springer 2007) 119.

*"...Whether a statement is made orally or in writing makes no essential difference for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive."*<sup>482</sup>

Notwithstanding the immateriality of form, the unilateral nature is what distinguishes unilateral regime from bilateral and multilateral treaty regimes. Unlike treaty regimes where there is a reciprocal manifestation of will between the contracting states, in the case of unilateral actions, first, the manifestation of the 'will' emanates from one end. Though, there could be more than a single entity manifesting a will. Secondly, the intended addressee has no role in the manifestation of the will.<sup>483</sup>

ii. Publicity of the action:

One of the elements of unilateral actions is publicity of the action or statement culminating into legally binding obligation. The publicity element was recognised by the ICJ in Nuclear Tests Case, and ILC in the *'Guiding Principles*

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<sup>482</sup> *Nuclear Tests (New Zealand v. France) Judgement*, (n 465) [48].

<sup>483</sup> The ILC working group elaborated on the unilaterality element as follows: 'The fundamental characteristic of unilateral legal act is, logically, their unilateral nature. They emanate from one single side (from the latin "latus"), in other words, from one or several subjects of internationally acting "unilaterally" and participation of another party is not required. This characteristic, which is to be seen both in the structure and in the object and content of the act, leaves "plurilateral" international legal acts, such as treaties, outside the scope of the study. But it does not exclude so-called "collective" or joint acts, inasmuch as they are performed by a plurality of States which do not intend to regulate their mutual relations by this means, but no express, simultaneously or in parallel fashion, as a unitary block, the same willingness to produce certain legal effects without any need for the participation of other subjects or "parties" in the form of acceptance, reciprocity, etc.' ILC, 'Unilateral Acts of States, Report of the Working Group', (1997) UN Doc A/CN.4/L.543 para 10.

*applicable to unilateral declarations of State capable of creating legal obligations.*<sup>484</sup>

The ICJ in the Nuclear Tests case was confronted with the issue of public declaration. In the case, it was established before the ICJ that France had made public its intention to cease the conduct of atmospheric tests pursuant to various statements issued by French officials particularly the statements by French President and the Defence Minister. Accordingly, the Court held that *'...An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.'*<sup>485</sup>

The element of publicity is to a certain extent troubling, particularly if the element is to be taken literally. The trouble lies in the fact that states may usually anoint the recipient or the beneficiary of their statement, declaration or even conduct. In addition, such declarations or statements may be issued or occur in camera or at a secluded meetings. Thus, it's unclear if 'publicity' is to be considered as a condition relating to validity of unilateral actions or not. Ian Brownlie at the deliberations of the ILC working group alluded to this dilemma that *'in practice, many unilateral acts were performed by diplomats without publicity'*.<sup>486</sup> In **Legal Status of Eastern Greenland (Norway v Denmark)**,<sup>487</sup> The PCIJ regarded a declaration made by the Norwegian

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<sup>484</sup> ILC, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations: ILC Report (58th Session, 2006)', UN Doc. A/61/10 370.

<sup>485</sup> *Nuclear Tests (New Zealand v. France) Judgement*, (n 465) [46].

<sup>486</sup> ILC, 'Unilateral Acts of States, Summary Record of the 2543rd Meeting', (1998) UN Doc A/CN.4/SR.2543 para 18.

<sup>487</sup> *Legal Status of Eastern Greenland Case (Denmark v Norway) Judgement* (n 447).

Foreign Minister to her Danish counterpart at a closed door meeting as unilateral declaration.<sup>488</sup>

Flowing from the above, it becomes clear that publicity element need to be qualified otherwise genuine unilateral actions by states might be excluded as lacking in publicity element. In addition, the Eastern Greenland case further confirms Brownlie's concern and subsequent remarks, where he opined that:

*"...the criterion of publicity ...was certainly relevant in terms of evidence and the identification of those to whom the act was addressed. It was not however, a necessary condition for the act to produce legal effects."*<sup>489</sup>

From the foregoing, the element of publicity can be understood as a criterion applicable to public statements and declarations only, as in **nuclear test cases**. In non-public statements and declarations, the criterion can hardly be treated as pre-requisite, and can be deemed satisfied, where addressee or the intended beneficiary of the unilateral action is made aware of the action or the statement. This understanding of the 'publicity' element has been the dominant understanding among the major publicists in the area.<sup>490</sup>

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<sup>488</sup> The famous declaration ie 'Ihlen Declaration' which the court considered binding against Norway was as follows 'I told the Danish Minister to-day that the Norwegian Government would not make any difficulty in the settlement of this question'. The statement was issued at a closed door meeting between the two ministers. Ibid 17.

<sup>489</sup> ILC, 'Multiple Topics, Summary Record of the 2527th Meeting', (1998) UN Doc A/CN.4/SR.2527 para 5.

<sup>490</sup> As remarked by Fiedler: 'There is virtually complete agreement that an expression of intent by the declaring state alone is not sufficient, but that the declaration must be brought to the notice of the subject of international law concerned...This Condition follows from the good faith principle, as only on this basis can a situation of trust be created. It is not in fact necessary for the third state concerned to develop this trust.' 'Unilateral Acts in International Law, in R. Bernhardt (ed.) Encyclopedia of Public International Law', (n 459) 521.

iii. Intention to be legally bound:

Generally, international law places great emphasis on the intention of parties.<sup>491</sup> Intention or manifestation of will is regarded as the cornerstone of unilateral actions. In the **Nuclear Tests Case**, the ICJ held that “...*When it is the intention of State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration.*”<sup>492</sup> This position was further reiterated in **Burkinafaso v Mali**,<sup>493</sup> where the ICJ confirms the centrality of intention while analysing the statement of Malian head of state regarding compliance with the decision of Organization of African Union. According to the court, citing from Nuclear test cases, “...*it all depends on the intention of the State in question,...it is for the court to ‘form its own view of the meaning and scope intended by the author...*”<sup>494</sup>

As unilateral action can be expressed by way of statement, declaration, and conduct, the intention to be legally bound can as well be ascertained expressly or through the interpretation of an action, conduct, surrounding circumstance

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<sup>491</sup> *Case concerning the Temple of Preah Vihear (Cambodia v Thailand) Preliminary Objections*, [1961] ICJ Rep 17 (ICJ) 31.

<sup>492</sup> *Nuclear Tests (New Zealand v. France) Judgement*, (n 465) [43].

<sup>493</sup> *Case Concerning the Frontier Dispute (Burkinafaso v Mali) Judgement*, [1986] ICJ Rep 554 (ICJ).

<sup>494</sup> *Ibid* 39.

or subsequent behaviour of the state.<sup>495</sup> In **Nuclear Test** cases “...not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound-the intention is to be ascertained by interpretation of the act.”<sup>496</sup> Two layers appear to crystallize regarding the intention element. First, is where the intention is obvious and conveyed expressly, the ascertainment of which would not require any further interpretation. The second is where the ascertainment of the intention would require judicial interpretation. In both, the determination as to the existence of such an intention is squarely placed on the body adjudicating the dispute.<sup>497</sup> The only distinction is, in the case of the former the ascertainment of the intention is direct, having flowed directly from the state action or conduct, while in the later, the ascertainment of the intention is to be arrived at indirectly through the medium of interpretation. In interpreting sovereign intention, the ICJ appears to adopt a cautious and narrow approach particularly where the intention is ambiguous. The reason for the narrow approach may not be far-fetched, given the implication of such intentions and their consequent restriction on state sovereignty. In **Nuclear Tests case** the ICJ held that ‘...when states make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.’<sup>498</sup> In **Military and Paramilitary**

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<sup>495</sup> ‘Unilateral Acts of States’, , *International Law: Achievements and Prospects* (Brill) 232.

<sup>496</sup> *Nuclear Tests (New Zealand v. France) Judgement*, (n 465) [47].

<sup>497</sup> Fernández de Casadevante Romani (n 470) 120.

<sup>498</sup> *Nuclear Tests (New Zealand v. France) Judgement*, (n 465) [47].

**Activities in and against Nicaragua**,<sup>499</sup> the ICJ applied the restrictive approach while interpreting the communication of Nicaraguan authorities. The Court having examined the communication and the announcement of Nicaraguan authorities with a view to ascertain whether Nicaragua has intended to bind itself regarding its domestic policies, concluded as follows:

*"...the Court is unable to find anything in these documents, whether the resolution or the communication accompanied by the 'Plan to secure peace' from which it can be inferred that any legal undertaking was intended to exist."*<sup>500</sup>

Similarly, in **Burkinafaso v Mali** the Court following its dicta in Nuclear Tests cases and Military and Paramilitary Activities in and against Nicaragua case regarding restrictive interpretation of sovereign intention applied the restrictive approach with an additional caution. According to the Court, there is a duty on the Court to show greater caution while interpreting sovereign intention in unilateral declarations not addressed to any particular recipient.<sup>501</sup> The Court further devoted a lengthy paragraph to distinguish its ascertainment of intention in Nuclear Tests Case with the case before it. According to the court, the circumstances are radically different necessitating different outcomes. The Court having formed its view on the meaning intended by Mali as proclaimed by the Malian head of state that '*...my Government will comply with the decision*' concluded that '*...there are no grounds*

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<sup>499</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) Merits*, [1986] ICJ Rep 14.

<sup>500</sup> *Ibid* 261.

<sup>501</sup> *Case Concerning the Frontier Dispute (Burkinafaso v. Mali) Judgement*, (n 482) [39].



*to interpret the declarations made by Mali's Head of State on 11 April 1975 as a unilateral act with legal implications...*<sup>502</sup>

It must be pointed out that the ILC guiding principles<sup>503</sup> followed suit in recognising the essential nature of intention. Article 1 of the Guiding principles, incorporates '...the will to be bound...' as a condition, for creating legal obligations. Article 3 provides that in determining legal effect of unilateral actions, courts must take into account the content of the declarations, factual circumstance and the reactions to which such declarations gives rise to. More germane to intention is article 7, which provides for restrictive interpretation in the event of doubtful declarations.<sup>504</sup>

Indeed, the ILC guiding principles were inspired by the ICJ decisions. As such, the requirements of examining *the content of a declaration, the factual circumstance, the reaction they gave rise to, and the clarity of the declarations* have all been laid down by the ICJ. In **Armed Activities on the Territory of Congo**,<sup>505</sup> the Court examined the actual content, surrounding circumstance

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<sup>502</sup> Ibid 40.

<sup>503</sup> ILC, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations: ILC Report (58th Session, 2006)', (n 473).

<sup>504</sup> 'A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated.' Ibid.

<sup>505</sup> *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda) Judgment*, [2005] ICJ Rep 168.

and further concludes that a unilateral statement must be made in clear and specific terms.<sup>506</sup>

From the foregoing, the element of intention is undoubtedly crucial. As laid down by ICJ, a clear and precise unilateral action, statement or conduct is likely to convey and manifest clearly an intention to be bound. Where the intention to be bound is less clear, the ICJ takes into account the content of the action, the circumstance and the reaction to the unilateral action in determining the intention of the declarant state. In addition, where there is doubt as to the intended obligation, the court construes such intention narrowly.

iv. Author must be subject of International Law:

One of the elements of unilateral actions is the author of the action must be competent in law. Persons acting on behalf of a state must be capable of binding the state. It is settled principle of international law that certain state officials are capable of binding state by virtue of their authority.<sup>507</sup>

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<sup>506</sup> Ibid 293.

<sup>507</sup> In Nuclear Tests Case the ICJ while remarking on the statement made by the French president reiterated the position of international law as follows: 'Of the statements by the French Government now before the Court, the most essential are clearly those made by the President of the Republic. There can be no doubt, in view of his functions, that his public communications or statements, oral or written, as Head of State, are in international relations acts of the French State. His statements, and those of members of the French Government acting under his authority, up to the last statement made by the Minister of Defence (of 11 October 1974), constitute a whole. Thus, in whatever form these statements were expressed,

In **Armed Activities on the Territory of Congo** the Court was confronted with a statement issued by Rwandan Justice Minister before United Nations Commission on Human Rights. Congo argued that such statement amounts to unilateral statement by an authorised official and therefore binding on Rwanda. Rwanda on the other hand argued that the statement having not emanated from the President or Foreign Affairs Minister could not be attributed to Rwandan state. The Court while agreeing with Congo on the competency of Justice Minister to bind her State, reiterated its position in *Nuclear Tests* case, and elaborated further by taking into account the development in governance and resultant changes in state representations at both domestic and international fora.<sup>508</sup>

The position of ICJ in both *Nuclear Tests case* and *Armed Activities on the Territory of the Congo* regarding the need to recognise authorised entities/individuals to bind states, is in line with the ILC Articles on State Responsibility for Internationally Wrongful Acts,<sup>509</sup> the ILC Draft Guiding

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they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made.’ *Nuclear Tests (New Zealand v. France) Judgement*, (n 465) [51].

<sup>508</sup> In its judgement, the Court agreeing in part with Congo on the competency of the Justice Minister to bind her state held as follows: ‘...with increasing frequency in modern international relations other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in their field of competence in the area of foreign relations, and even of certain officials.’ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda) Judgement*, (n 138) [47].

<sup>509</sup> Article 7 of the Articles on State Responsibility provides as follows: ‘The Conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person

Principles applicable to unilateral declarations of States,<sup>510</sup> and Vienna Convention on the Law of Treaties.<sup>511</sup>

From the foregoing, it can be concluded that a person natural or artificial making a unilateral action on behalf of a state, must be capable of binding the state in accordance with the established jurisprudence of ICJ and the afore-cited Conventions and Guidelines. Indeed, one of the dilemmas surrounding the competency of the person performing unilateral action is where the authorised person exceeded its authority, or acted unlawfully. Regarding this dilemma, article 7 on State Responsibility though silent on unlawful actions *ab initio*, considers 'authorised acts in excess of authority' as attributable to state. The unlawful actions will be addressed under the lawfulness of the object of unilateral actions.

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or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.' 'International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Available at: <http://www.refworld.org/docid/3ddb8f804.html> [accessed 29 May 2014]'.

<sup>510</sup> Articles 2 and 4 of the ILC Draft Guiding Principles applicable to unilateral declarations provides as follows: Article 2: 'Any State possesses capacity to undertake legal obligations through unilateral declarations.' Article 4: 'A unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so. By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations. Other persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence.' ILC, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations: ILC Report (58th Session, 2006)', (n 473).

<sup>511</sup> An analogy can be drawn from the VCLT regarding the competency of state representatives in treaty making. Article 7 (2) of the VCLT provides as follows: "In virtue of their functions and without having to produce full powers, the following are considered as representing their state: (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to conclusion of a treaty; (b) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited; (c) Representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ." United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, Vol. 1155, P. 331, and Available at: <http://www.refworld.org/docid/3ae6b3a10.html> [accessed 29 May 2014].

v.      Legality and Appropriateness of the Object:

Another element of unilateral action is that the object of the unilateral action must be appropriate and legal. While the appropriateness of the object of unilateral actions refers to the realistic possibility of performing the subject matter of the unilateral action, the legality aspect connotes that the object must not be unlawful. In other words, unilateral action or declarations containing impossible tasks are generally invalid. Regarding the legality aspect, first, it is settled principle that any unilateral action in violation of *jus cogens* is void. This principle is well established in many ICJ cases, and further reiterated in Article 8 of the ILC Guiding principles on unilateral actions. Secondly, is where the unlawfulness of the object does not violate *jus cogens*, but conflicts with other international law commitments undertaken by the State performing the unilateral action. Here, the commitment by the state to fulfil the unilateral action may likely *attract international responsibility of the state*.<sup>512</sup> As one commentator argued in this respect, '*...there is little reason not to treat the situation where the fulfilment of a new undertaking is incompatible with an earlier one in the same manner as in the law of treaties*'.<sup>513</sup> Thirdly, is where the unilateral obligation is in conflict with the domestic law of the state making the declaration. Here, it will be difficult for such a 'conflict' or violation of domestic law to be treated as a clog to the fulfilment of unilateral undertaking

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<sup>512</sup> Goodman (n 466) 55.

<sup>513</sup> Eckart (n 462) 244.

under international law.<sup>514</sup> This is because, under the ILC Articles on State Responsibility, domestic laws cannot be relied upon to justify derogation from performing or complying with an international obligation.<sup>515</sup> In this respect, a commentator remarked that, *"Where a (state) representative is competent according to this standard and represents his or her state, it should be his or her task and not that of addressee to ensure that the commitment undertaken is in conformity with its municipal provisions."*<sup>516</sup>

On the other hand, it need to be stressed that while domestic law could not be relied upon to trump performance of unilateral obligation, the nature of the domestic law in question may however, need to be specified. Where the domestic law in question is of fundamental importance relating to the competency in authoring the unilateral action, an analogy may be drawn with article 46 of the VCLT where an exception to the irrelevance of domestic law is recognised.<sup>517</sup>

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<sup>514</sup> Reisman and Arsanjani (n 20) 339.

<sup>515</sup> According to article 32, 'The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part. 'International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Available at: <http://www.refworld.org/docid/3ddb8f804.html> [accessed 29 May 2014]' (n 498).

<sup>516</sup> Eckart (n 462) 236.

<sup>517</sup> According to article 46 of VCLT: 1. 'A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.' 2. 'A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.' United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html> [accessed 29 May 2014] (n 250).

Flowing from the above elements of unilateral actions, it can be summarised that, while unilaterality and publicity could be seen as more of features (form) of unilateral actions than validity elements, a valid unilateral action must contain: (a) a manifested will (intention) devoid of defect. (b) Must be made by a competent subject. (c) Must be in respect of an appropriate and legal object. Upon fulfilment of these essential elements, a binding unilateral action can be said to exist. A legitimate expectation flowing from such unilateral action, declaration, statement, or conduct is usually accorded legal protection. The creator of such expectation is not allowed to revoke its assurance unless in specified instances recognized by law.

vi. Revocation of Unilateral Actions:

Generally, a unilateral action once validly crystallized cannot be revoked arbitrarily.<sup>518</sup> The ICJ in both *nuclear tests case* and *Military Paramilitary Activities against Nicaragua case* <sup>519</sup> unequivocally underscore the basis why

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<sup>518</sup> In *Nuclear Tests Case* the Court finds that ‘...the unilateral undertaking resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration.’ The Court went further to add that ‘...the French Government has undertaken an obligation the precise nature and limits of which must be understood in accordance with the actual terms in which they have been publicly expressed.’ *Nuclear Tests (New Zealand v. France) Judgement*, (n 465) [53] Similarly, In *Military and Paramilitary Activities in and against Nicaragua* the ICJ reiterated its position on sanctioning arbitrary revocation of unilateral actions. The Court in its judgement regarding unilateral declarations pursuant to article 36 (2) of the ICJ statute held that ‘...the unilateral nature of declarations does not signify that the State making the declaration is free to amend the scope and the contents of its solemn commitments as it pleases.’; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) Jurisdiction and Admissibility Judgement*, [1984] ICJ Rep 392 [59].

<sup>519</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Jurisdiction and Admissibility Judgement*, (n 507) [59].

expectations created pursuant to unilateral actions shall not be reneged upon arbitrarily. The freedom of states to voluntarily make such solemn undertakings was heralded by ICJ as ‘facultative’ allowing states to foreseeably commit to what can be fulfilled. In both cases the ICJ highlighted the sign-posts to guide the determination of arbitrary revocation.<sup>520</sup> In similar vein, The ILC Guiding Principles on Unilateral Declarations followed suit in sanctioning arbitrary revocation of unilateral commitments and reiterating the factors to be taken into account in assessing arbitrary revocation. In this regard, article 10 provides:

*“A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to:*

- (a) Any specific terms of the declaration relating to revocation;*
- (b) The extent to which those to whom the obligations are owed have relied on such obligations;*
- (c) The extent to which there has been a fundamental change in the circumstances.”*

Flowing from the ICJ cases and the ILC guiding principles, it can be argued that arbitrary revocation of unilateral action is completely sanctioned by the totality of the ICJ jurisprudence, leaving no room for ambiguity. However, both the ICJ and the ILC Guidelines have not expressly provided a conclusive answer to the non-arbitrary revocations. This gap or ambiguity deliberate or otherwise provided a window where revocation argument was resurrected in

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<sup>520</sup> According to the Court: ‘In making the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions and reservations. In particular, it may limit its effect to disputes arising after a certain date; or it may specify how long the declaration itself shall remain in force, or what notice (if any) will be required to terminate it.’ Ibid.



the circle of the publicists. Some even argued that States are entitled to *presumption of revocation of unilateral actions*. According this school, the rule is ‘...State can modify or revoke its unilateral act at will and at any time.’<sup>521</sup> Proponents of this argument relied on the supposed distinction between binding force of unilateral act and revocation and modification of same. On the other hand, some publicists are of the view that some unilateral actions are irrevocable.<sup>522</sup> Proponents of this school appear to have analogised with part V of the VCLT dealing with termination, and suspension of treaties as a ceiling to their argument against revocation of unilateral actions.<sup>523</sup> Navigating the depth of the two extreme viewpoints is outside the purview of this work. However, a reconciliatory position is, the two contending views as extreme as they look, are not far from each other. The distinction is largely on what the general rule is, and what the exception is. Both approaches have recognised:

- a. A unilateral undertaking shall not be revoked arbitrarily.
- b. A unilateral undertaking may simultaneously contain a revocation notice or terms.
- c. Successful defence of fundamental change of circumstances can justify revocation.

In addition, it must be admitted that there are law and policy dimensions regarding both positions discussed above. On one hand, there is need to

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<sup>521</sup> ‘Unilateral Acts of States’ (n 484) 234.

<sup>522</sup> Vladimir Đuro Degan, *Sources of International Law* (Martinus Nijhoff Publishers 1997) 291.

<sup>523</sup> Eckart (n 462) 253.

ensure that states are not being overtly over-burdened by holding them to account over their pure voluntary statements and other related policy objectives.<sup>524</sup> On the other hand, fizzling out genuine expectations of addressees, who were led to alter their positions in good faith and against whose benefit undertakings were made, would undoubtedly render the entire unilateral undertakings regime nugatory. Indeed, it makes no sense if law shall allow victims of reneged promises at the mercy of the makers of the promises.<sup>525</sup>

Having acknowledged the above dilemma between broad interpretation of unilateral undertakings with limited revocation scope, and narrow interpretation of unilateral undertakings with broad revocation scope, it can be said that contributory to the dilemma was the absence of clear juridical rule guiding the interpretation by ICJ in this area. Therefore, covering this gap by resorting to ILC guidelines and the VCLT for guidance would undoubtedly bridge this gap. More importantly, the VCLT has a detailed prescriptive guidance regarding the revocation, modification and suspension

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<sup>524</sup> As one commentator remarked while critiquing the Nuclear Tests case as follows: 'If policy pronouncements or expressions of intention can be construed to be irrevocable without detrimental reliance or any other formality beyond the possibly transitory intention of the declarant state, the result is hardly likely to be greater adherence of states to their pronouncements....it is much more likely to result in greater disregard by states of the asserted dictates of the law and greater reluctance by states to publish their intentions....to make an expressed intention irrevocable without reliance cannot encourage the sort of open discussion of positions and issues that leads to stability in international affairs. Nor can it lead to a respect for international obligations to regard them as created so easily.' Alfred P Rubin, 'International Legal Effects of Unilateral Declarations, The' (1977) 71 American Journal of International Law 1, 30.

<sup>525</sup> As Atiyah in the opening quotation of this chapter opined: 'A man may think he ought to fulfil a promise, but his thinking that he has an obligation cannot actually be the source of the obligation, if it was only honest men would be bound...' Atiyah (n 356) 18.

of treaties which could aid the courts and tribunals to analogically enrich the unilateral declarations regime.

#### **4.1.5 Concluding Remarks on Legitimate Expectations under General International Law**

From the broad international law context analysis above, the conception and application of legitimate expectations posits two peculiar constellations. First, the formulation and application of legitimate expectations under the general international law postulates an ‘intra’ problem of interconnectedness among the “expectation-protective” principles of *abuse of right*, *acquiescence*, *equity*, *estoppel*, *good faith*, *reasonableness* and *unilateral declarations*. This distinguishes general international law, from the specific regimes where the principle of legitimate expectation appears to be clearly delineated with little overlap into other related principles. Secondly, the scenario of the expectations under general international law posits an ‘inter’ regime problem between general international law and specialised regimes. Under general international law, the notion of protecting legitimate expectations is inter-state, where states expect each other to behave in a particular manner or refrain from behaving in a particular manner. In this regard, the subject matter of protection is ‘state expectations’ which in a way distinguishes expectations scenarios in broad international law from legitimate expectations under specific regimes. Under the specialised regimes of human rights, European Union, and international

investment law, the subject matter of protection is ‘individual’s expectations’, not state expectations.

## **4.2 Legitimate expectations under WTO**

### **4.2.1 Legitimate expectations under WTO: Overview**

WTO law is a jurisprudence rooted on a multilateral treaty. One of the key contributions of WTO to international law is the “rule-oriented”<sup>526</sup> dispute settlement approach enshrined in the WTO dispute settlement system. Under the dispute settlement rules, a uniform approach set out by article 11 DSU tasks the dispute settlement panels to make objective assessment of matters in conformity with relevant WTO agreements.<sup>527</sup> Article 3.2 DSU describes the WTO dispute settlement system as nucleus in providing security and predictability to the multilateral treaty and therefore mandates WTO tribunals to interpret and clarify WTO agreements in accordance with customary rules of public international law.<sup>528</sup> In the exercise of their adjudicatory role, the panel and the appellate body have pursuant to customary rules of interpretation under the VCLT deployed the use of principles to determine

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<sup>526</sup> ‘Rule-oriented’ approach as opposed to ‘power-oriented’ approach has been described by Petersmann as ‘...negotiations among governments or individuals on the elaboration and observance of general rules of conduct which all participants voluntarily accept because the rules reconcile their conflicting short-term interests with their common long-term interests in a mutually beneficial manner.’ Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (Martinus Nijhoff 2012) 66–67.

<sup>527</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) 1869 U.N.T.S. 401; 33 ILM 1226 (1994) (n 90).

<sup>528</sup> Ibid Article 3.2.

and clarify less clear and often ambiguous provisions of the WTO jurisprudence. Thus, the principle of legitimate expectations among the generality of the principles applied by WTO dispute settlement bodies is said to permeate the overall WTO jurisprudence. According to Jackson, fulfilment of expectations is a fundamental goal of international agreements such as WTO.<sup>529</sup> The formulation and application of legitimate expectations under WTO emanates from the good faith obligation under international law<sup>530</sup> and Principle of equity.<sup>531</sup> Both principles though not explicitly prescribed appear to pervade the entire operational stages of WTO, from pre-accession to dispute resolution, including state's repudiation to participate in the WTO system.<sup>532</sup> Their role is to 'inject security and predictability into the multilateral trading system' as a whole as contracting parties are entitled to form legitimate expectations regarding their trade behaviour, maintenance of generalised conditions affecting future trade and overall consistency and predictability of the WTO law.

In augmenting predictability in the WTO system, the principle of legitimate expectations functions interactively with the basic rules and principles of

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<sup>529</sup> According to Jackson "An important goal of international agreement is the fulfilment of expectations of the parties to the agreement. These expectations may have been aroused or engendered by a variety of factors, but one can empirically observe the effect of the practice of the institution upon the expectations of national representatives to that institution and the effects that these expectations have in turn upon national governments." See; John H Jackson, *World Trade and the Law of GATT* (Lexis Law Pub 1969) 19.

<sup>530</sup> Panizzon (n 12).

<sup>531</sup> Cottier (n 393) 123-147.

<sup>532</sup> Cottier (n 393).

WTO. These basic rules and principles includes<sup>533</sup>: a. The principles of non-discrimination b. rules on market access and transparency c. rules on unfair trade d. rules on conflicts between trade liberalisation and other societal values and interests, e. rules on special and differential treatment f. dispute settlement procedural rules. In addition, the principle ensures equal condition of competition between WTO member states. In **Japan-Film**<sup>534</sup> the panel alluded to this function that legitimate expectations protects “relative conditions of competition which existed between domestic and foreign products as a consequence of the relevant tariff concessions.”<sup>535</sup> Other functions of the principle have been outlined<sup>536</sup> to include, protection of trade partners from detrimental change in their competitive opportunities, protection of assurances under waiver, negotiation for commitments regarding access to projects under Government Procurement Agreements, etc.

#### 4.2.2 Formulation of Legitimate Expectations under WTO

The nature of WTO obligations and overall objectives of WTO norms have attracted substantial analysis among WTO commentators.<sup>537</sup> The analysis

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<sup>533</sup> Bossche (n 145) 37.

<sup>534</sup> *Japan – Film Panel Report, Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179.

<sup>535</sup> Ibid 10.86.

<sup>536</sup> Panizzon (n 12) 97.

<sup>537</sup> Generally on the nature of WTO obligations, see; Chios Carmody, ‘A Theory of WTO Law’ (2008) 11 *Journal of International Economic Law* 527; Joost Pauwelyn, ‘A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?’ (2003) 14 *European Journal of International Law* 907; Chios C Carmody, ‘WTO Obligations as Collective’ (Social Science Research Network 2006) SSRN Scholarly Paper ID 1092718 <<http://papers.ssrn.com/abstract=1092718>> accessed 25 August 2014.

deployed by the commentators' largely<sup>538</sup> points towards analogy with domestic legal systems which invariably connotes the traditional domestic law norms divide between contractual and constitutional regimes. The divide breeds, two conceptual approaches, namely, contractualism and constitutionalism approaches. According to contractual approach, WTO law obligations are like contracts where two or more states may agree to take certain obligations among themselves, free to negotiate terms and free to vary and amend their contractual terms. Proponents of contractual approach further described WTO as mere negotiating ground for negotiating agreements bilaterally among WTO contracting states. An extended argument of contractual approach can be seen in the WTO-bilateralism position which opines that WTO obligations are 'bundle of bilateral relations' whose object is trade between countries in a bilateral form.

On the other hand, Constitutional approach had appealed to many commentators particularly the pioneer publicists in the area. The proponents of Constitutional approach compare WTO with domestic constitutions. In outlining the constitutional features of WTO, the proponents argued that, first; WTO obligations consist of a single undertaking that applies to all WTO member states something akin to domestic constitutions. Secondly, the WTO provides for an international institution with a framework for the global trading system and therefore creates a "higher law" binding on states.

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<sup>538</sup> There are commentators the analogised with overall nature of obligations under international law, particularly from the dimension responsibility. See; Tarcisio Gazzini, 'The Legal Nature of WTO Obligations and the Consequences of Their Violation' (2006) 17 *European Journal of International Law* 723.

Thirdly, the WTO provides for judicial review like a domestic constitutional system. The review mechanism offers “...a framework capable of reasonably balancing and weighing different, equally legitimate and democratically defined basic values and policy goals of a polity dedicated to promote liberty and welfare in a broad sense.”<sup>539</sup> Of recent, the Constitutional approach is reflected in the collectivism approach which identifies *expectations regarding trade-related behaviour* as the core in WTO norms. From both contractual-bilateral and constitutional-collective approaches it can be discerned that the formulation of legitimate expectations in WTO is conceptually rooted and thrives in the later approach ie constitutional-collectivism.<sup>540</sup> The approach recognises the latitude of the contracting parties to generate expectations among themselves. It recognises the leverage of WTO tribunals to take into account and apply the principle of legitimate expectations in interpreting WTO agreements and settlement of WTO disputes.<sup>541</sup>

In invoking the principle of legitimate expectations, both WTO panels and appellate body relied on the concept of good faith and International law maxim of *Pacta Sunt Servanda* as contained in Article 26 of the VCLT alluding

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<sup>539</sup> Thomas Cottier and Matthias Oesch, *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland: Cases, Materials and Comments* (Staempfli Publishers 2005) 534.

<sup>540</sup> Carmody, ‘WTO Obligations as Collective’ (n 526).

<sup>541</sup> Professor Andrew D Mitchell, *Legal Principles in WTO Disputes* (Reprint edition, Cambridge University Press 2011) 87.



to the obligation of contracting parties to abide by their treaty obligations. In **EC Sardines**<sup>542</sup>, the Appellate Body remarked that:

*"...We must assume that Members of the WTO will abide by their treaty obligations in good faith, as required by the principle of Pacta Sunt Servanda articulated in Article 26 of the Vienna Convention. And always in dispute settlement, every member of the WTO must assume the good faith of every other Member."*<sup>543</sup>

In plethora of reports, the panels and the appellate bodies have alluded to the derivation of legitimate expectations pursuant to good faith principle under International law. In **India Patents**<sup>544</sup> and **EC LAN**<sup>545</sup>, both panels concluded that good faith interpretation under Article 31 of the VCLT requires protection of legitimate expectations. Indeed, the Appellate Body in both cases rejected such conclusions in the context of violation complains and regarded such invocations as tantamount to misapplication of VCLT. Instructively, in **Korea-Government Procurement**<sup>546</sup> the panel traces the nexus between non-violations complaints and good faith principle and further considers non-violation complains as an extension of good faith requirement under international law. As the panel remarked:

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<sup>542</sup> *EC-Sardines Appellate Body Report, European Communities- Trade Description of Sardines, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359.*

<sup>543</sup> *Ibid* 278.

<sup>544</sup> *India – Patents (EC) Panel Report, India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, Complaint by the European Communities, WT/DS79/R, adopted 22 September 1998, DSR 1998:VI, 2661.*

<sup>545</sup> *EC – Computer Equipment Panel Report, European Communities – Customs Classification of Certain Computer Equipment, WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June 1998, as modified by Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, DSR 1998:V, 1891.*

<sup>546</sup> *Korea – Procurement Panel Report, Korea – Measures Affecting Government Procurement, WT/DS163/R, adopted 19 June 2000, DSR 2000:VIII, 3541.*

*"It seems clear that good faith performance has been agreed by the WTO members to include Subsequent actions which might nullify or impair the benefits reasonably expected to accrue to other parties to the negotiations in question."*<sup>547</sup>

Therefore, there is clear recognition of the concept of good faith as the foundational basis for applying the principle of legitimate expectations and associated principles such as abuse of right, due process, estoppel etc. under WTO. Indeed, Good faith is regarded in international law as *a general principle of law* that controls the exercise of rights by states. Thus, the principle of legitimate expectations as an appellation of Good Faith could be understood as practical application of good faith in an interactive setting among WTO contracting states. As Cottier and Schefer remarked on the role of the principle of legitimate expectations, *"Interaction creates mutual expectations...the decision maker must ask whether one party held an objectively reasonable, or legitimate, expectation that it would receive some benefit."* In the next heading, the thesis shall examine the application of legitimate expectations under WTO.

#### **4.2.3 Scenarios of Legitimate Expectations under WTO**

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<sup>547</sup> Ibid 7.94.

Generally, WTO dispute settlement provisions provides for three scenarios, giving rise to causes of action allowing aggrieved members to initiate the dispute settlement process. Article XXIII:1 GATT provides in this regard:

*"If any Member should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of;*

- a. The failure of another Member to carry out its obligations under this Agreement, or*
- b. The application by another Member of any measure, whether or not it conflicts with the provisions of this Agreement, or*
- c. The existence of any other situation*

*The contracting party may with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned."*

The above mentioned causes of action are not limited to GATT only, same causes of action are replicated in GATS and TRIPS. Following the provision under reference, and in line with the role of legitimate expectations in most binding agreements, the principle, is invoked in the WTO jurisprudence under the scenarios of violation complains, non-violation complains and in maintaining consistency regarding adopted Panel and Appellate Body Reports.

*a. Violation Complaints Scenario:*

Article XXIII:1 (a) GATT above allows WTO member states to file complaints against another member where the latter takes a measure in violation of its commitments or obligation under WTO. Such alleged violations might result in impairing or nullifying a benefit that ought to accrue to the aggrieved

party. In **EC Asbestos**<sup>548</sup> the Appellate Body elaborated on the content of violation complain as follows:

*"Article XXIII:1 (a) sets forth a cause of action for a claim that a Member has failed to carry out one or more of its obligations under the GATT 1994. A claim under Article XXIII:1(a), therefore, lies when a Member is alleged to have acted inconsistently with a provision of the GATT 1994...."*<sup>549</sup>

Therefore, refusal to carry out an obligation or contravening a clear WTO obligation would invariably amount to violation of the legitimate expectations of the aggrieved party. Indeed, identifying a violation of legitimate expectations within violations complaints is a contested reasoning. In general, the WTO Appellate body had repeatedly rejected the role of legitimate expectations in the determination of violation complaints. In **India-Patents**<sup>550</sup> the panel having reviewed India's mailbox application system concluded that the system was in violation of TRIPS and contrary to the legitimate expectations of other member states. On appeal before the appellate body, the appellate body concluded that mixing violation of WTO obligation with the legitimate expectations of a member state will tantamount to wrong reading of Article XXIII: 1 (a) & (b). According to the Appellate Body, much as legitimate expectations is not reflected in the language of the treaty itself, it

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<sup>548</sup> EC – Asbestos Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243.

<sup>549</sup> Ibid 185.

<sup>550</sup> India – Patents (EC) Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, Complaint by the European Communities*, WT/DS79/R, adopted 22 September 1998, DSR 1998:VI, 2661 (n 533).

does not belong to violation complains but, rather to non-violation complains.<sup>551</sup>

In EC-LAN<sup>552</sup> similar conclusion was reached regarding the role of legitimate expectations in violation complaints. The panel considered whether tariff treatment of LAN equipment could give rise to legitimate expectations pursuant to Article II GATT. According to the Panel, legitimate expectations pursuant to Article II GATT are based on an assumption that *“actual tariff treatment accorded to a particular product at the time of negotiation will be continued unless such treatment is manifestly anomalous or there is information readily available to the exporting Member that clearly indicates the contrary.”*<sup>553</sup> Applying the assumption to the fact in EC-LAN, the panel was quick to recognise that the European Community practice of according LAN equipment tariff treatment as ADP machines during the Uruguay round of negotiation is sufficient to generate legitimate expectations of US regarding the continuity of such practice. The panel further rejected any attempt to place the burden of clarifying ambiguity or unclear manifestation of representation or conduct on the US being the recipient of such representation or conduct. According to the panel, to place such a burden of seeking clarification on the recipients would

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<sup>551</sup> India – Patents (US) Appellate Body Report, India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9 [42].

<sup>552</sup> EC – Computer Equipment Panel Report, European Communities – Customs Classification of Certain Computer Equipment, WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June 1998, as modified by Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, DSR 1998:V, 1891 (n 534).

<sup>553</sup> Ibid 8.45.

*"...risk an erosion of the confidence upon which it is necessary for parties to rely in the conduct of tariff negotiations, as onerous..."*<sup>554</sup> In its findings, the panel concluded that first; United States was entitled to legitimately expect that LAN equipment would continue to be accorded tariff treatment as ADP machines in the European Communities. Secondly, the legitimate expectations of US were frustrated by the subsequent change in the reclassification practice in the European Community. Thirdly, by frustrating the legitimate expectations of US, the European Communities have violated Article II: 1 GATT by failing to accord imports of LAN equipment from US treatment no less favourable than that provided under European Communities.

Upon appeal to the Appellate body, following its jurisprudence in **India-Patent** rejected the Panel's findings regarding legitimate expectations. According to the Appellate body, the panel was wrong in concluding that the meaning of a tariff concession in a Member's Schedule may be determined in the light of legitimate expectations of an exporting member and such interpretation being in accordance with Article 31 Vienna Convention on the Law of Treaties. Therefore, the panel was wrong in considering legitimate expectations as vital element in the interpretation of Article II: I GATT and member's Schedules.

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<sup>554</sup> Ibid 8.49.

Notwithstanding the above cases, commentators have argued that the Appellate body had missed the point in both **India-Patent** and **EC-Lan** cases regarding the method of invoking legitimate expectations.<sup>555</sup> As argued,<sup>556</sup> the values or interests sought to be protected by nullification and impairment regime under WTO is akin to those values and interests falling within the scope of coverage of Good Faith. In other words, to strictly adhere to the exact treaty violation would simply yield a wrong result.

*b. Non Violation Complains Scenario*

In Non-violation scenario the focus is on measures not directly in violation of any provision of WTO law, but on measures that nullifies/impairs a benefit or impedes achievement of an objective. In other words, in non-violation complaints, the measure do not clearly violate the text of WTO agreement but undermines a benefit that should accrue to any of the contracting parties. In **Japan- Film** the panel described the purpose of non-violation complaint as “...to protect the balance of concessions under GATT by providing a means to redress government actions not otherwise regulated by GATT rules that nonetheless nullify or impair a Member’s legitimate expectations of benefits from tariff negotiations.”<sup>557</sup>

Non violation complains are generally considered as the main domain of legitimate expectations under WTO. The principle of legitimate expectations

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<sup>555</sup> Laurent A Ruessmann, *The Place of Legitimate Expectations in the General Interpretation of the WTO Agreements* (Institute for International Law of the KU Leuven 2002) 6.

<sup>556</sup> Thomas Cottier and Krista Nadakavukaren Schefer, ‘Good Faith and the Protection of Legitimate Expectations in the WTO’ [2007] *Challenge of WTO law : collected essays* 57–58.

<sup>557</sup> *Japan – Film Panel Report, Japan – Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179 (n 523) [10.50].*

plays a significant role in establishing non-violation due to the permeable nature of non-violation complaints. Legitimate expectations also help in assessing whether a WTO consistent measure that nullifies and impairs benefit that ought to accrue to a contracting party is reasonably foreseeable. The panel in Japan-Film summarised the required applicable tests in non-violation cases. These tests entail three elements that a complaining party must demonstrate in order to make out a claim under Article xxiii: I (b) as follows:

- a. Application of a measure by a WTO member;
- b. a benefit accruing under the relevant agreement;
- c. Nullification or impairment of the benefit as a result of the application of the measure.

The application of legitimate expectations under WTO, either in the context of violation or non-violation cases, both revolves around the totality of measures affecting trade. Governments, most often as source of creating or removing barriers to trade, use laws, regulations, requirements, administrative actions etc. to enact and implement such measures. Therefore, where a state embarked upon enacting or implementing a measure, it is likely that the measure could nullify or impair a benefit being enjoyed by WTO member state. Consequences of such nullification or impairment could result in either violating WTO agreement or simply impairing a benefit without necessarily violating any WTO agreement.



c. *Adopted Panel and Appellate Body Reports Scenario*

Although, WTO adopted Panel and Appellate Body Reports binds only the parties to the dispute, it is accepted however, that such reports could create legitimate expectations on the WTO member states. The member states can legitimately expect that Panel and Appellate bodies shall take into account their previous findings when confronted with similar cases. In **Japan-Alcoholic Beverages II**<sup>558</sup> the Appellate Body held that adopted panel reports ‘...create legitimate expectations among WTO members, and, therefore, should be taken into account where they are relevant to any dispute’. In **US-Softwood Lumber V**<sup>559</sup>, The Appellate Body takes into account its reasoning and findings in EC-Bed linen. The basis for invoking legitimate expectations regarding WTO dispute settlement bodies can be traced to Article 3.2 of the DSU. Article 3.2 provides as follows:

*“The dispute settlement system of the WTO is central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the Covered agreements and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”*

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<sup>558</sup> Japan – Alcoholic Beverages II Appellate Body Report, Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97.

<sup>559</sup> US – Softwood Lumber V Appellate Body Report, United States – Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R, adopted 31 August 2004.

The notion of security and predictability provided by Article 3.2 DSU has been described by the Appellate Body in **Japan-Alcoholic Beverages II**<sup>560</sup> as the goal sought to be achieved by the WTO system. According to the Appellate Body:

*“WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or inflexible as not to leave room for reasoned judgements in confronting the endless ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the ‘security and predictability’ sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system.”*<sup>561</sup>

Undoubtedly legitimate expectations pursuant to Dispute Settlement reports are non-justiciable and unenforceable, as they possess no cause of action against which an aggrieved party can file a complaint. The role of this type of expectations are simply to direct the policy objective of WTO towards predictable framework which parties can rely and coordinate their activities, rather than constituting a cause of action.

#### **4.2.4 Elements of Legitimate Expectations under WTO**

Legitimate expectations like in previous regimes discussed entails presence of *assurance/conduct, reliance, revocation and damages (Injury)*.<sup>562</sup>

##### **a. Assurances/Conduct - Benefit**

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<sup>560</sup> *Japan – Alcoholic Beverages II Appellate Body Report, Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97 (n 547).*

<sup>561</sup> *Ibid* 31.

<sup>562</sup> Cottier and Nadakavukaren Schefer (n 545) 54.

In the context of WTO, assurances are usually in the form of conditions of competition negotiated between WTO member states culminating into benefits accruing to the states. These benefits includes assurances as to *improved market access*, non-discrimination, price effect etc Assurances giving rise to legitimate expectations may be express or implied. Instances of implied assurances include state conduct, Policy, negotiation practice, and legal framework such as GATT provisions.<sup>563</sup> Such assurances can be conveyed by states through their delegates during trade negotiations etc. *In German Import Duties on Starch and Potato Flour*<sup>564</sup>, The head of German delegation conveyed a letter to Benelux Countries representatives containing following representation:

*“...The Government of the Federal Republic of Germany is prepared to open negotiations with the Governments of the Benelux Countries on the subject of a new reduction of German duties on starch and starch derivatives with a view to applying as soon as possible under the new German custom tariff a duty of 15 per cent on starch derivatives.”*<sup>565</sup>

The panel deciding the dispute found that the letter having contained an assurance to negotiate the resolution of the dispute gives rise to legitimate expectations on the part of the recipients. Similarly in **Korea-Government**

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*Japan – Alcoholic Beverages II Appellate Body Report, Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97 (n 523).*

<sup>563</sup> Adrian T&#46 Chua, ‘Reasonable Expectations and Non-Violation Complaints in GATT/WTO Jurisprudence’ (1998) 32 *Journal of World Trade* 27, 32–36.

<sup>564</sup> *Germany – Starch Duties* GATT Panel Report, *German Import Duties on Starch and Potato Flour*, W9/178, 16 February 1955, *unadopted*, BISD 3S/77.

<sup>565</sup> *Ibid.*

**Procurement**<sup>566</sup> the panel indicated that expectations could be generated in the context of negotiations. According to the panel “...Members should not take actions, even those consistent with the letter of the treaty, which might serve to undermine the reasonable expectations of negotiating partners.”<sup>567</sup> In **Oilseeds I**<sup>568</sup> the panel considered a conduct of an established negotiation practice as a source of legitimate expectations. According to the panel:

*“...the partners of the Community in the successive renegotiations under Article XXIV:6 could legitimately assume, in the absence of any indications to the contrary, that the offer to continue a tariff commitment by the Community was an offer not to change the balance of concessions previously attained.”*<sup>569</sup>

Another method of creating expectations recognised by WTO law is state policy. In **Australian Subsidy on Ammonium Sulphate**<sup>570</sup> the Panel considered a continuous policy as giving rise to an assurance. The Panel found that the removal of Sodium Nitrate fertilizer from the pool of subsidized fertilisers by Australia was in violation of Chile’s legitimate expectations that Australia’s policy of subsidy in Ammonium Sulphate and Sodium nitrate, a policy which was made due to local scarcity would continue to apply to both Fertilizers.

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<sup>566</sup> Korea – Procurement Panel Report, Korea – Measures Affecting Government Procurement, WT/DS163/R, adopted 19 June 2000, DSR 2000:VIII, 3541 (n 535).

<sup>567</sup> Ibid 7.93.

<sup>568</sup> EEC – Oilseeds I GATT Panel Report, European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, L/6627, adopted 25 January 1990, BISD 37S/86.

<sup>569</sup> Ibid 146.

<sup>570</sup> Australia – Ammonium Sulphate Working Party Report, The Australian Subsidy on Ammonium Sulphate, GATT/CP4/39, adopted 3 April 1950, BISD II/188.

The totality of the cases considered above have all pointed to various methods or sources of generating legitimate expectations. Thus, not only express assurance can give rise to legitimate expectations. Expectations can arise from conduct, practice, Policies, pre-existing conditions, and provisions of WTO agreements. These methods of sourcing legitimate expectations need to guide the complaining party to specify a recognised benefit accruing to it under WTO. Benefit as discussed above, connotes overall conditions of competition under WTO or as commentator opined “...a competitive relationship between a foreign and domestic product established by the binding of the relevant tariff position.”<sup>571</sup>

#### b. Reliance

The second element needed in establishing a violation of legitimate expectations is reliance. Traces of reliance as an element of legitimate expectations, is considered in many panel and appellate body reports. In **Norway-Restrictions**<sup>572</sup> on Imports of Certain Textile Products the panel considered Hong Kong’s “substantial interest” as the legitimate right to expect compliance with an assurance emanating from the general agreement. Similarly, in **Oilseeds I** a past negotiation practice was regarded as basis for

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<sup>571</sup> Armin von Bogdandy, ‘The Non-Violation Procedure of Article XXIII: 2, GATT; Its Operational Rationale’ (1992) 26 Journal of World Trade 95, 98.

<sup>572</sup> According to the panel: ‘Since Hong Kong has a substantial interest in supplying eight of the nine product categories in question to the Norwegian Market, it had the right to expect the allocation of a share of the quotas in accordance with Article XIII:2(d).’ *Norway – Textiles* GATT Panel Report, *Norway – Restrictions on Imports of Certain Textile Products*, L/4959, adopted 18 June 1980, BISD 27S/119 [16].

reliance among the negotiation parties. According to the Panel, the EEC's continuation of tariff commitment signifies an offer '*not to change the balance of concessions previously attained*.'<sup>573</sup>

However, while it is quite easy to show reliance behaviour in legitimate expectations claims, there are commentators who took the view that the element of 'reliance' is not a requisite for establishing violation of legitimate expectations.<sup>574</sup> Their argument in rejecting reliance hinges on the instances where legitimate expectations can be made to appear without necessarily identifying the specific reliance behaviour of the complaining party. Cases of legitimate expectations involving non-reliance behaviour include situations where the source of the expectations is WTO law such as GATT provisions, or pre-existing competitive conditions.

### c. Nullification and Impairment (Revocation)

Nullification or impairment element in WTO lexicon is like typical revocation element in legitimate expectations scenarios. The element requires that a party alleging violation of its legitimate expectations must prove that the measure introduced and applied by the Respondent state does provide a benefit or impose a burden, and above all, has adverse effect and results in frustration of

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<sup>573</sup> EEC – Oilseeds I GATT Panel Report, European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, L/6627, adopted 25 January 1990, BISD 37S/86 (n 557) [146].

<sup>574</sup> Chua (n 552) 47.

legitimate expectations. It is instructive to note that reference to ‘measure’ in this regard is confined to state measures involving government actions, conduct, or policies as opposed to private parties’.<sup>575</sup> Therefore, the measure complained of must in addition to being a state measure, emanate from the Respondent. In **Norway-Restrictions on Imports of Certain Textile Products** the panel held that a measure inconsistent with the general agreement is *prima facie* amounting to nullification and impairment of a benefit contrary to legitimate expectations of the contracting parties.<sup>576</sup> In **Korea-Government Procurement**, while alluding to the relevance of time, the panel remarked regarding revocation of a benefit that “...the nullification or impairment of the benefit as result of the measure must be contrary to the reasonable expectations of the complaining party at the time of the agreement.”<sup>577</sup> As to the legitimacy of the expectations, the measure must not have been reasonably foreseen or anticipated.<sup>578</sup>

Moreover, the burden of proving the nature of the adverse effect and the frustrative element of the challenged measure is on the complaining State.

The determination of reasonableness of the complaining state’s expectations

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<sup>575</sup> *Japan – Film Panel Report, Japan – Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179 (n 523) [10.52].*

<sup>576</sup> *Norway – Textiles GATT Panel Report, Norway – Restrictions on Imports of Certain Textile Products, L/4959, adopted 18 June 1980, BISD 27S/119 (n 561) [17].*

<sup>577</sup> *Korea – Procurement Panel Report, Korea – Measures Affecting Government Procurement, WT/DS163/R, adopted 19 June 2000, DSR 2000:VIII, 3541 (n 535) [7.85].*

<sup>578</sup> According to the panel in *Japan-film*: ‘If the measures were anticipated, a member could not have had a legitimate expectation of impaired market access to the extent of the impairment caused by these measures.’ *Japan – Film Panel Report, Japan – Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179 (n 523) [10.80].*

will depend on the surrounding circumstances of the claim. In establishing the causal connection between the challenged measure and its adverse effect on the competitive positions, the panels are concerned with whether the challenged measure has caused the nullification and impairment, whether the relative conditions of competition has been upset by the introduction of the measure, and whether the measure is intended to nullify benefit or not,<sup>579</sup> and lastly the overall impact of the measure as whole.

Lastly, consequences of violation of legitimate expectations may depend on whether the violation fall within violation or non-violation scenario. In the event of violation complaint, the panel can order for restitution to the aggrieved party. As to non-violation scenarios, which largely attracts legitimate expectations plea, it is settled precedence, that the panel can only recommend change of behaviour, or mutual adjustment but no binding or authoritative order.

#### **4.2.5 Concluding remarks on Legitimate Expectations under WTO**

The jurisprudence of WTO has clearly embrace the application legitimate expectations. The conception and application of the principle having been rooted pursuant to good faith principle also assumed a dominant position at least with respect to non-violation complains. The relevance of the

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<sup>579</sup> Ibid 10.87.



jurisprudence to investment treaty arbitration can hardly be overstated. Both trade and investment are treaty based regimes and both belong to the domain of economic law. References to WTO jurisprudence in investment treaty awards are ubiquitous and incline towards transposing well-tested jurisprudence of WTO to the emerging investment treaty regime. The reference to WTO jurisprudence by Walde in Thunderbird separate Opinion regarding investor's legitimate expectations is, for the purposes of this research understood in that context. As he rightly put it; "*A certain measure of recognition of this principle can be inferred from several WTO panel decisions...*"<sup>580</sup> Thus, not only inference can be made from the jurisprudence of WTO on legitimate expectations, rather there are lessons to be learned by investment treaty tribunal in both formulation and application of the principle of legitimate expectations.

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<sup>580</sup> *International Thunderbird Gaming Corporation v. United Mexican States* (n 7) [29].

## **Chapter V: Legitimate Expectations under European Court of Justice (ECJ) and European Court of Human Rights (ECtHR)**

### **5.0 Introduction**

In this chapter the principle of legitimate expectations shall be discussed from both ECJ and ECtHR's perspective. The grouping of the two separate courts under this chapter is for ordering and convenience factor. In addition, the conception and application of the principle by both courts is rooted on one hand, on the general principles of EU law, and on the other hand the recognition of right to property under the European Convention on Human Rights. Therefore, the jurisprudence of both courts shall be examined separately with a view to bring to analyse how the courts have been applying the principle of legitimate expectations and the considerations been taken by the both courts in the determination or otherwise of the requisite elements constituting the principle. The Chapter is divided into four broad sections. Section briefly introduces the chapter as a whole; section two deals the principle of legitimate expectations under ECJ in details. Section three provides for an analytical account of legitimate expectations under ECtHR, and lastly section four concludes.

### **5.1 Legitimate Expectations under ECJ: An overview**

The principle of legitimate expectations is part of the fundamental general principles recognised and applied by the European court of justice as forming

part of the European legal order.<sup>581</sup> It denotes that assurances relied upon in good faith should be honoured.<sup>582</sup> Generally, an individual's (natural or artificial) expectations are likely to be affected by the overall administrative and regulatory functions of EU public institutions in three broad categories. These are direct decisions, indirect decisions, and lastly areas of law-making. **Firstly**, cases of *direct decisions* are by definition instances where the EU institutions directly engage in administrative decisions.<sup>583</sup> **Secondly**, cases of indirect decisions are instances where EU decisions are being carried out by the national authorities of the EU member states. EU institutions in practice do rely on their domestic rules and institutions to implement and enforce certain EU laws and decisions.<sup>584</sup> **Thirdly**, EU *law-making function* refers to instances where EU institutions engage in the passage of legislation or other

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<sup>581</sup> Case 112/80 Firma Anton Durbeck v Hauptzollamt Frankfurt am Main- Flughafen (1981) ECR 1095 para 48.

<sup>582</sup> Case 5/75 Deuka Deutsche Kraftfutter GmbH B. J. stolp v Einfuhr - und Vorratsstelle for Getriedeund fultermittel (1975) ECR 0759 Per A.G. Trabucchi, See also Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials* (2nd edn, Cambridge University Press 2010) 412.

<sup>583</sup> For instance, a direct decision conferring right is defined “...a measure by which a public authority exercises power conferred on it by law or by regulation, in the fulfilment of its public service, and which creates legal relations between the administration and those subject to it,..” Examples of direct decisions establishing right includes appointment of staff, salary grading etc. See; Advocate General Lagrange, Case 14/61 Koninklijke Nederlandsche hoogovens en Staalfabrieken NV v High Authority of the European Coal and Steel Community (1962) ECR 253.

<sup>584</sup> A typical example of this category is EU law on Agriculture whose implementation and enforcement is not by EU directly, but by the authorities of member states. Prominent instances of legitimate expectations under this category are: a. Recovery of EU financial benefits wrongly granted/paid to an individual. b. Recovery of a levy incorrectly not levied. c. Repayment of wrongly levied amounts. Cases of legitimate expectations under this category are quite minimal compared to direct actions by EU authorities. Schwarze (n 91) 970-979.

forms of law-making which has bearing on the overall individuals and entities within the EU legal order.<sup>585</sup>

The Regulatory and administrative functions of EU institutions in the categories above, relate with individuals in form of conferral of right/benefit on individuals, imposition of burden, or mere declaratory function. In positive terms, such regulatory and administrative decisions could confer rights or benefits on individuals. In negative terms, such administrative decisions could impose restrictions/burdens on individuals. While in a neutral sense such decisions could be simply law-making. Generally, All EU measures, for the purpose of generating legitimate expectations are not hortatory; rather, they embody external legal effect.

In the determination of legitimate expectations pursuant to the categories above, it can be discerned that certain functions could be lawful *ab initio*, while some could not be lawful at their inception.<sup>586</sup> On one hand, a lawful EU regulatory and administrative function could *prima facie* give rise to a successful plea for legitimate expectations. On the other hand, an unlawful EU regulatory and administrative function from the outset could hardly ground a successful plea of legitimate expectations.

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<sup>585</sup> The crux in EU law-making scenario is the issue of retrospectivity in legislation. The Courts have developed a detailed jurisprudence regarding the legality or otherwise of retrospective legislation as it affect legitimate expectations of private entities. *Ibid.*

<sup>586</sup> Craig provides a broad categorization from lawful/unlawful dimension. See Paul Craig, *EU Administrative Law* (2nd edn, OUP Oxford 2012) 556–566.

The trigger for the violation of legitimate expectations in the three categories above is where the EU public institutions directly or indirectly revoke/withdraw the initial decision, or change the operative law.<sup>587</sup> Revocation could take place, factually in all the three categorized decisions. An individual, natural or artificial aggrieved by such revocations could seek judicial review through two gateways. First, pursuant to Article 263 (TFEU),<sup>588</sup> this provides that an individual who has direct dealing with EU regulatory bodies can institute an action for violation of legitimate expectations directly against such institutions. Secondly, pursuant to Article 267 (TFEU), this provides that an action for violation of legitimate expectations could be maintained against national administrative authorities implementing EU regulations before national courts of member states. Subsequently, issues could be formulated before the national courts and be referred to the Court of justice for interpretation.

Undoubtedly, the relevance of introducing various categories where issues of legitimate expectations have been litigated is to put in place proper foundation of discerning various approaches adopted by the European court of justice with due respect to the peculiarities of the categories. It need to be stated however, that one of the flaws to the approach is the absence of a generic criteria that could describe pattern of analysis used and observed by

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<sup>587</sup> Stefan M. Stefanson, Legitimate Expectations in EC/EEA Law in Mario Monti, Nikolaus Von Und Zu Liechtenstein and Bo Versterdorf (eds), *Economic Law and Justice in Times of Globalisation: Festschrift for Carl Baudenbacher* (Bilingual, Nomos Verlagsgesellschaft 2007) 636.

<sup>588</sup> Treaty on the Functioning of European Union (TFEU)

the European court of justice in its formulation and application of legitimate expectations in each category. More particularly, for the purpose of a study of this nature that seeks to distil relevant adjudicative standards used by the Court. It can be discerned from the categories highlighted, that analysis of legitimate expectations would obviously entail diverse scenarios. Craig<sup>589</sup> aptly categorized the scenarios into four, namely:

- Where a public authority makes a decision and subsequently revokes it.
- Where a public authority makes a decision and subsequently makes a decision inconsistent with the representation.
- Where a public body replaces an existing policy with a different one.
- Where a public body departs from its policy in a particular case.

In what follows from the introduction, the chapter will first, briefly, revisit the foundational basis of legitimate expectations as conceptualised under EU law. Secondly, the chapter will examine the criteria for ascertaining legitimate expectations under ECJ. Thirdly, the chapter will identify the key elements of legitimate expectations. Section four, will deal with the legitimacy dimension, while section five concludes on the relevance of the ECJ approach to the non EU regime, particularly investment treaty arbitration.

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<sup>589</sup> Craig (n 575) 553.

### 5.1.1 Basis for protecting Legitimate Expectations under ECJ

In understanding the underlying basis behind ECJ's approach of protecting legitimate expectations, various reasons had been advanced by the court and scholars. One of the most prominent reasons offered is "legal certainty". Indeed, the ECJ's formulation of the principle is intertwined with the principle of legal certainty. Legal certainty encapsulates the notion of predictability planning and coherence as very much in tuned with law.<sup>590</sup> The impetus of the principle entails that law should be clear, unambiguous and predictable to the extent individuals can project and plan their lives in accordance with the law. Both legal certainty and legitimate expectations aimed at ensuring that the European Union Law is generally accessible and foreseeable.<sup>591</sup> However, as the cases will illustrate, not all scenarios of legitimate expectations could be totally rationalised from the lens of legal certainty, particularly in view of the recognised powers of public administrators to alter their positions when circumstances dictate.<sup>592</sup> Another explanation offered is "Rule of Law". The ECJ in several occasions remarked that, both legitimate expectations and legal certainty constitute superior rules of law.<sup>593</sup> Schwarze also argued that both legal certainty and legitimate expectations are derived from the notion that "Community is based on the rule of law".<sup>594</sup> Fairness and equity were also considered as a rationale for the

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<sup>590</sup> Alina Kaczorowska, *European Union Law* (2nd edn, Routledge-Cavendish 2010) 232.

<sup>591</sup> Gordon (n 166) 228.

<sup>592</sup> See: Per Sedley J. in *R v Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Ltd* (1995) 2 All ER 714, at 724

<sup>593</sup> See: Case 112/80 *Firma Anton Durbeck v Hauptzollamt Frankfurt am Main-Flughafen* (1981) ECR 1095 para 48

<sup>594</sup> Schwarze (n 91) 867.

protection of legitimate expectations. According to this view, the principle of legitimate expectations has equitable function enabling the court to ensure fairness in public administration. Other reasons offered include “Reliance”, and “trust”.<sup>595</sup>

Indeed, none of the aforementioned reasons has precisely captured the width and breadth of the principle as applied by the court in all conceivable scenarios.<sup>596</sup> While legal certainty and the rule of law could offer explanation why retroactive legislations should be sanctioned by the courts, hardly could same explanation be plausible in justifying the protection of legitimate expectations where trust and detrimental reliance as embodied in a given fact is more visible in the eyes of the courts. In the next heading, the chapter will examine methods used by the ECJ in ascertaining legitimate expectations.

### **5.1.2 Method of Ascertaining Legitimate Expectations under ECJ**

The European court of justice relies on various criteria to ascertain the principle of legitimate expectations. Regrettably, those criteria are not entirely uniform.<sup>597</sup> Two-tier approaches<sup>598</sup> stood out in the analysis of the

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<sup>595</sup> For a general overview of the rationales See; Craig (n 575) 554–556.

<sup>596</sup> Paul Reynolds, ‘Legitimate Expectations and the Protection of Trust in Public Officials’ (Social Science Research Network 2010) SSRN Scholarly Paper ID 1689518 <<http://papers.ssrn.com/abstract=1689518>> accessed 3 February 2013.

<sup>597</sup> According to Schwarze, “...it is hardly possible – at least not on the basis of the case law of the Court of Justice in its present state of development- to compile a universally binding and definitive list of relevant circumstances.” See: Schwarze (n 91) 950.

<sup>598</sup> While the two tier approach could be analysed as (a) reasonability and (b) legitimacy dimension of legitimate expectations, Paul Craig’s analysis rather analyses legitimate expectations as (a) legitimacy and (b) balancing. According to Craig, “The ECJ will...normally consider the legitimacy of the expectation separately from whether there are valid policy reasons for



formulation and application of legitimate expectations by the court. The first approach is to determine the existence of the expectations otherwise referred to as reasonable expectations, while the second approach is to determine the legitimacy of the expectations.

**a. Reasonability of Expectations:**

In ascertaining reasonableness of an alleged legitimate expectation, the court is simply concerned with the existence of the expectations first, from both litigant's subjective perspective and non-litigant's objective perspective. This is to ensure by that the identified expectation satisfies the necessary elements of reasonable expectations. This process is both fact-dominated and criteria-driven. The litmus test adopted by the court is "whether an informed prudent and discriminating person would have had such expectations." The Court further deploys both objective and subjective analysis to ascertain whether indeed, an alleged expectation is reasonable enough to deserve legal protection. As the Court remarked in this context:

*"If a prudent and discriminating economic operator could have foreseen the adoption of a community decision likely to affect his interest, he cannot plead that principle if the decision is adopted."*<sup>599</sup>

Applicants alleging violation of legitimate expectations must satisfy this objective foreseeability test. In **Kingdom of Spain v Council of the European**

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*departing from that expectation."* See: Pp Craig, 'Substantive Legitimate Expectations in Domestic and Community Law' (1996) 55 The Cambridge Law Journal 289, 306.

<sup>599</sup> Case C-426/10 Bell & Rose BV, v Office for Harmonization in the Internal Market (Trademarks and Designs) (OHIM) (2011) E.C.R. 00000 para 56

**Union**, Spain challenges the regulation of European Union providing tariff quota for imports of canned tuna and subsequent reduction in the quota rate. According to Spain the reduction in the quota rate violates among other things the legitimate expectations of investors who prior to the community regulation, invested heavily in the affected countries. The Court while rejecting the Spanish argument concludes that the investors and traders should have foreseen the adoption of the decision. The court further remarked:

*“...the traders concerned could not have harboured any expectation based on the maintenance of the rate of customs duty which applied to imports of canned tuna originating in Thailand and Philippines during the consultations and mediation between those countries and the community. It was, on the contrary, foreseeable that those procedures could lead to a reduction in that rate.”*<sup>600</sup>

Similarly, in **Erwin Behn Verpackungsbedarf GmbH v Hauptzollamt itzehoe** the applicant paid customs duty for import in accordance with a manual of German Ministry of finance which erroneously contained a wrong figure for imports below the legally authorised charges. When asked to pay the difference, the applicant challenged the decision on the ground of violation of legitimate expectations having been misled earlier by the German authorities. The ECJ while dismissing the Applicants plea for violation of legitimate expectations concluded that the burden was on the applicant to be prudent. The Court remarked as follows:

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<sup>600</sup> C-342/03 Kingdom of Spain v Council of the European Union (2005) ECR I-01975 para 48

*“...a trader whose business essentially comprises import and export transactions and who has accumulated some experience in that area must...acquaint himself with the community law applicable to the transactions which he undertakes.”*<sup>601</sup>

It can be discerned from these cases that the prudent economic operator’s test is strict. The practice of the court places a larger burden on the applicant to be discharged; otherwise, it will be resolved in favour of the Union institutions. The degree of diligence expected on the Applicants covers wide range of issues surrounding the legal and regulatory framework of European Union. Especially in highly regulated areas, where applicants are expected to acquaint themselves with European Union laws as authentically documented, including negotiations prior to changes in laws and policies of the Union. Paul Craig summarizes the depth of this approach as follows:

*“The demands placed on the trader to be prudent, discriminating and well-informed have led to failure of many claims for legitimate expectations, more especially in the areas where common policies operate, such as agriculture, fisheries, and transport. The rules in these areas are frequently changed to cope with factors that affect these markets. It is therefore especially difficult to sustain a claim for legitimate expectations, since the Union courts will expect the prudent trader to factor the possibility of such change into market calculations.”*<sup>602</sup>

#### **b. Legitimacy of expectations:**

On the legitimacy of expectations, the court is concerned with the legitimacy of the expectations that already satisfied the reasonableness criteria. The first

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<sup>601</sup> Case 80/89 Erwin Behn Verpackungsbedarf GmbH v Hauptzollamt itzehoe (1990) ECR 1-02659 para 14

<sup>602</sup> Craig (n 575) 570.

concern here is whether there are valid justifications for departing from the expectations. Subsequently, the court would examine whether there is public interest concern counter to the fulfilment of reasonable expectations. The test adopted by the court is whether the public interest concern militating against fulfilment of reasonable expectations is legitimately overriding.<sup>603</sup> This stage entails evaluation and balancing between reasonable expectations on one hand and public interest on the other hand. In view of the recognition of the legitimate powers of EU and national authorities in the initial balancing and evaluation between reasonable expectations and public interest, the court is mostly guided by 'margin of respect' to public bodies, the size of which depends on the subject matter in a given case.<sup>604</sup> Where there is no compelling public interest concern; the court would usually treat the established expectations as legitimate and accord it protection. In **Kingdom of Spain v Council, supra** The court, after applying 'prudent trader test' concluded with the approach of balancing with a wide margin of respect to public bodies.

According to the court:

*"...since the Community institutions enjoy a margin of discretion in the choice of the means needed to achieve the common commercial policy, traders cannot claim to have a legitimate that an existing situation will be maintained."*<sup>605</sup>

It is clear from both reasonableness and legitimacy dimensions of legitimate expectations that the dichotomy between the two (if any) is marginal. This is

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<sup>603</sup> Gordon (n 166) 237.

<sup>604</sup> Sharpston (n 19) 4.

<sup>605</sup> C-342/03 Kingdom of Spain v Council of the European Union (supra) para 49

because; both “prudent economic operator” and “balancing” tests overlaps in the practical application in a given case. It suffices however, to assert at this stage, that both are constitutive whole in ascertaining legitimate expectations. Indeed, while the “prudence” test focuses more on the reasonable ingredients to be ascribed to an alleged expectation, the balancing test inclines more towards legitimacy of the overall protection to be accorded to the alleged expectation.<sup>606</sup> In the next two headings, the chapter will examine the elements of legitimate expectations from both reasonability and legitimacy dimensions respectively.

### **5.1.3 Elements of Reasonable Expectations under ECJ**

From the generality of cases in the ECJ, an Applicant alleging violation of legitimate expectations must satisfy the requirements of Representation/conduct, Reliance, and Revocation/withdrawal.

#### **a. Representation/Conduct:**

The case law of ECJ specifies that an individual alleging violation of legitimate expectations must show that the authorities must have given some assurance in form of representation or conduct capable of endangering reasonable expectations.<sup>607</sup> Generally, there is no strict form of assurance

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<sup>606</sup> Gordon (n 166) 236.

<sup>607</sup> See: Joined Cases C-37/02, C-38/02 Di Lenardo and Di Ietto (2004) ECR 10000, para 70,

under the ECJ.<sup>608</sup> Assurances could be triggered through various forms such as letters, fax, reports, agreements, administrative statements, decisions etc.<sup>609</sup> However, such assurances/conduct/representations must at the minimum reach a level of *‘creating a pardonable confusion in the mind of a person acting in good faith and with all the diligence required of a normally informed businessman’*.<sup>610</sup> This can be established pursuant to an oral or written assurance/representation or consistent conduct by the public body concerned.<sup>611</sup> In addition, it must satisfy some criteria developed by the ECJ case law. **First**, the assurance must be ‘precise and specific’. As illustrated in **Bell & Rose BV, v Office for Harmonization in the Internal Market (Trademarks and Designs) (OHIM)** the court succinctly summarised this rule as follows;

*“...the right to rely on that principle extends to any person with regard to whom an institution of the European Union has given rise to justified hopes. However, a person may not plead infringement of the principle unless he has been given precise assurances by the administration”*.<sup>612</sup>

In **Mulder v. Minister van Landbouw en Visserij**,<sup>613</sup> an implied representation was tested before the ECJ. The background to the case was, the European Market was in excess of milk production. In the effort to restrain

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<sup>608</sup> Craig (n 575) 567.

<sup>609</sup> Schønberg (n 9) 120.

<sup>610</sup> See: Case C-44/00 Societe de distribution mecanique et d’automobiles v Commission (2000) ECR I-11231 para 50.

<sup>611</sup> While oral statements could amount to precise and specific assurance, in practice they carry less weight, and often difficult to prove. See: Schønberg (n 9) 121.

<sup>612</sup> Bell & Rose BV, v Office for Harmonization in the Internal Market (Trademarks and Designs) (OHIM) (2011) E.C.R. 00000 para 56

<sup>613</sup> Case 120/86, Mulder v. Minister van Landbouw en Visserij (1988) E.C.R. 2321

surplus of milk products in the market, the Commission introduced regulation 1078/77. Under the regulation, farmers and milk producers are encouraged to cease production and suspend marketing in return for a premium during the suspension period. In addition, during the suspension period, a new regulation ie no. 857/84 further requires proof of milk production before issuance of reference quantity to enable milk production without incurring additional levy. Mr Mulder pursuant to regulation 1087/77 suspended milk/dairy production and delivery for 5 years. In return, he benefitted from the premium scheme during the period of suspension. However, after the expiry of the 'suspension undertaking' and upon Mulder's resumption of milk production, he applied for allocation of reference quantity. He was denied on the ground of his inability to prove his milk production of the previous year as required by law. He appealed against the refusal decision, and argued that it was impossible for him to prove any milk production because he had suspended his milk production during the previous 5years in compliance with regulation 1078/77. Therefore, the new regulation of 857/84 was in violation of his legitimate expectations that he should be able to resume his business upon the expiry of the suspension undertaking. The Court agrees 'in part' with Mr Mulder's submission and held as follows:

*"There is nothing in the provisions of Regulation no 1078/77 or in its preamble to show, that the non-marketing undertaking entered into under that Regulation might, upon its expiry, entail a bar to resumption of the activity in question. Such an effect therefore frustrates those producers' legitimate*

*expectation that the effects of the system to which they had rendered themselves subject would be limited.”*<sup>614</sup>

The court, however, maintained that it will be wrong for a producer such as Mr Mulder to legitimately expect that the conditions would remain static, and be able to resume production under the previously applied conditions. It can be observed here, that the basis of Mr Mulder’s legitimate expectations was an *implied representation* pursuant to Regulation no 1078/77. Although the regulation encourages producers such as Mr Mulder to suspend production, it did not expressly mention that those who suspend production will automatically be entitled to resume production.

**Secondly** mere silence is incapable of qualifying as specific representation, conduct, or an acceptable assurance to endanger legitimate expectations. In the case of **Chomel v Commission**<sup>615</sup> the Applicant Mr Chomel was employed by the Commission of European communities as administrator. While accepting the offer of employment, he pointed out to the commission that he considered himself as an employee entitled to ‘expatriation allowance’ and further requested a written confirmation to that effect. The Commission did not provide any written confirmation or rejection of Mr Chomel’s request. Having discovered from his salary statement that the commission had not paid the allowance, he submitted a complaint against the refusal decision. The Commission rejected the complaint. He further instituted an action before the court alleging violation of legitimate expectations. Indeed, Mr Chomel’s

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<sup>614</sup> Case 120/86, Mulder v. Minister van Landbouw en Visserij (supra) p 6

<sup>615</sup> Jean-louis Chomel v Commission of the European Communities (1990) ECR 11- 00131



argument was, the silence of the Commission pursuant to his written request constitutes an assurance and therefore endangers his legitimate expectations. The Court held in favour of the Commission. According to the Court, the silence by the Commission however regrettable, could neither amount to implied confirmation nor specific assurance by the commission.<sup>616</sup>

**Thirdly**, a conduct capable of endangering legitimate expectations must be consistent. In **Helmut Holtbecker v Commission**<sup>617</sup> the Applicant Mr Hotbecker (an employee of the European commission) challenged the Commission's refusal to refund medical expenses incurred by his spouse. According to the commission, the refusal was pursuant to community staff regulation rules which require employee spouses to register with a different insurance scheme first before resorting to the commission's scheme.

While alleging violation of legitimate expectations, the Applicant argued that since the Commission had previously reimbursed his spouse's medical expenses, the conduct led him to legitimately believe that his spouse was covered by the scheme. The court while rejecting Applicant's argument had this to say:

*"...an official may not plead a breach of the principle of legitimate expectations unless the administration has given him precise assurances. In the present case the mere fact that in the past a number of medical expenses of a relatively modest amount were reimbursed without reservation cannot be regarded as*

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<sup>616</sup> Jean-louis Chomel v Commission of the European Communities (supra) para 27

<sup>617</sup> Case T- 20/91 Helmut Holtbecker v Commission of the European Communities (1992) ECR 11-2600

*having been sufficient to lead the applicant to be certain that his wife was actually covered by the joint sickness insurance scheme or as constituting a fault on the part of the administration.”*<sup>618</sup>

Flowing from the above cases, the requirement of representation or specific assurance is the most important requirement Applicants need to satisfy. In many instances, cases are thrown out by the court due to the failure of the claimants to satisfy this requirement.<sup>619</sup> The requirement has also shown; that applicants cannot merely rely on general policy statement by an EU institution as initiating factor of legitimate expectations.<sup>620</sup>

#### **b. Reliance:**

An Applicant must show reliance on a particular representation or conduct. The test for determining this criterion is subjective. Reliance in the ECJ jurisprudence signifies a change in position by an applicant resulting to a state of inducement pursuant to a representation or conduct by the EU institutions.<sup>621</sup> The premise of this criterion is to distinguish mere existence of representation or conduct giving rise to legitimate expectations and the response of the claimant alleging violation of expectations by reposing trust in

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<sup>618</sup> Case T- 20/91 Helmut Holtbecker v Commission of the European Communities (supra) para 53

<sup>619</sup> As commentator remarked in this respect, “The crucial issue from the perspective of the applicant is ...to show that the representation...was sufficiently precise and specific to give rise to a legitimate expectation that it would be adhered to. It is this hurdle that applicants have found difficult to surmount, since the Community courts will not readily find that this criterion has been met.” See: Craig (n 575) 568.

<sup>620</sup> See: Case 111/86 Delauche v Commission (1987) ECR 5345

<sup>621</sup> Paul Lasok, Timothy Millett and Anneli Howard, *Judicial Control in the EU: Procedures and Principles* (OUP Oxford 2004) 362.

the representation or the conduct of the public authority. Indeed, a change of position could unilaterally occur devoid of any trigger emanating from EU institutions in form of representation or conduct. In such situations, no reasonable expectations can be generated due to the absence of a clear trigger that could accommodate any reliance. Similarly, a shift in position could as well occur prior to a specific representation or conduct. Here, any disappointment could hardly be linked to the incidental representation or conduct due to the lack of causal connection between the objectively assessed representation or conduct on one hand, and the subjective reliance by the claimant on the other hand. Even in post representation/conduct behaviour, a change in position or 'alleged reliance' post specific representation or conduct but not subjectively meant to respond to the representation or conduct in issue, could hardly succeed in grounding a successful plea of reasonable expectations. For instance, in **Agazzi Leonard v Commission**<sup>622</sup> the Applicant who claimed to be a victim of administrative reorganization challenged the decision barring her from changing her employment status as an infringement of her legitimate expectations. The Court discovered however, that the applicant could not have held any reasonable hopes at that time, because the administrative reorganization which she complained of was put in place prior to her qualification necessary to benefit from the old administrative system. According to the court, while the Applicant might

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<sup>622</sup> Case 181/87 Marie-Elizabeth Agazzi Leonard v Commission of the European Communities (1998) ECR para 35

have her reasons why she considered herself a victim of such administrative reorganisation, undoubtedly no legitimate expectations could be founded.

**c. Revocation or Departure from a Decision:**

Revocation or departure from an assurance or framework is the trigger to the legitimate expectations disputes. This is because where there is no revocation of a representation or conduct giving rise to expectations; the Applicant is unlikely to have a legitimate grievance before the EU Courts. Revocation of an assurance or change of regulation or policy is embedded in the EU framework. This explains why the principle of legitimate expectations is so central to the EU jurisprudence, to protect private entities from unjustified revocations by EU public institutions. Therefore, any determination of revocation or change will encompass the determination of the legality of the action, and the powers of the public entity(s) thereto.

Generally, EU authorities can revoke their assurances or change their legal and policy frameworks. Such revocations and changes could affect private entities in various ways. For instance, the revocation could be in form of withdrawal of an earlier conferred benefits, or removal of an imposed burden, or simply in form of law-making/declaratory decisions. First, the subject matter of revocation or departure from an assurance or policy involves analysis of the nature or type of the decision culminating into that assurance

itself. Pertinent questions need to be dissected. For instance, is the decision conferring benefit/right or imposing burden? Is the decision lawful or unlawful? Secondly, where revocation is permitted in principle, the next step is to decide whether it should be allowed prospectively or retrospectively. The ECJ jurisprudence in this area (*namely benefit vs burden, legal vs illegal, prospective vs retrospective revocation*) is not very clear.

**In Dineke Algera & Ors v Common Assembly of the European Coal and Steel Community**<sup>623</sup> the Applicant Miss Algera was a temporary staff of the Common Assembly. Subsequently, her temporary appointment was changed to permanent one to take effect in future date. The Common Assembly later, sought to revoke Applicant's permanent appointment. While deciding the case in favour of the Applicant, the ECJ emphasizes the nature and effect of the decision as follows:

*"...an administrative decision conferring individual rights on the person concerned cannot in principle be withdrawn, if it is lawful decision; in that case, since the individual right is vested, the need to safeguard confidence in the stability of the situation thus created prevails over the interests of an administration desirous of reversing its decision. This is true in particular of the appointment of an official."*

It can be discerned from Algera, that the general rule regarding specific lawful decisions conferring right or benefit is (in principle) irrevocability. Where however, the decision was unlawful, Algera, in another breath

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<sup>623</sup> Joined Cases 7/56 and 3 to 7/57 Dineke Algera & Ors v Common Assembly of the European Coal and Steel Community (1957) ECR 39

contemplated such scenario. According to the ECJ, the “absence of an objective legal basis” in a decision justifies its revocation due to the effect of the illegality on the right of the individual.<sup>624</sup> Indeed, ECJ in *Algera* did not go further to elaborate whether the revocation of an illegal decision should be prospective or retrospective. On the face of it however, prospective revocations are less problematic. ECJ had been consistent on its position that, in principle, prospective revocation of illegal or wrongful decisions is possible and can be justified.<sup>625</sup> In **Anton Herpels v Commission**<sup>626</sup>, The Applicant, a staff of the Commission who resides in Brussels and worked in Luxembourg was being paid separation allowance in accordance with EU public service regulations. Later, his status changed when he was transferred to Brussels but continued to receive separation allowance in error from the part of the Commission. When the Commission discovered the error, and revoked the separation allowance entitlement prospectively he challenged the decision alleging frustration of legitimate expectations. The Court while dismissing the claim decided that an unlawful payments or grants cannot confer an irrevocable vested right. The Court further added with regard to the nature of the revocation as follows:<sup>627</sup>

*“Although the retroactive withdrawal of a wrongful or erroneous Decision is generally subject to very strict conditions, on the other hand the revocation of such a Decision as regards the future is always possible.”*

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<sup>624</sup> Joined Cases 7/56 and 3 to 7/57 *Dineke Algera & Ors v Common Assembly of the European Coal and Steel Community* (Supra) p 55

<sup>625</sup> Case 15/60 *Simon v High Authority* (1961) ECR 115, p123

<sup>626</sup> Case 54/77 *Anton Herpels v Commission* (1978) ECR 0585

<sup>627</sup> Case 54/77 *Anton Herpels v Commission* (supra) para 38

Flowing from Herpels above, one can safely conclude that in principle retroactive revocations are not allowed except under strict conditions. **SNUPAT** is the locus classicus of retroactive revocation of unlawful decisions. In **SNUPAT v High Authority of the European Coal and Steel Community**,<sup>628</sup> SNUPAT applied to the High Authority for derogation from paying levy under scrap metal equalisation fund. The application was refused having failed to qualify for the exemption under the scrap metal scheme. SNUPAT then, protested against the High authority for awarding similar derogation previously to Hoogoven, a competitor to SNUPAT, and further urged the court to retroactively revoke the derogation granted to its competitor. Indeed, the court found in favour of SNUPAT that the derogation granted to Hoogoven was illegal and must be revoked. As to whether it should be revoked retroactively, the court reiterated the position of law in the member states that allows retroactive withdrawal of administrative decisions on the basis of false or incomplete information. However, that notwithstanding, according to the court, the nature of such determination requires the interplay between two competing legal principles of legal certainty and legality. According to the court, the High Authority is best suited to carry this appraisal and balancing first, before resorting to the court. The court while referring the matter for revocation to the High Authority held as follows:

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<sup>628</sup> Case 42/59 S.N.U.P.A.T. v High Authority of the European Coal and Steel Company (1961) 00053

*“The court cannot put itself in the place of the High Authority and must consequently confine itself to referring the matter back to the High Authority so that it may make that appraisal in accordance with Article 34 of the treaty.”*<sup>629</sup>

Despite the overlap in the classifications of various decisions i.e. (lawful vs. unlawful, burden, benefit and declaratory, retroactive vs. prospective), generally, permissible revocation of decisions leading to possible violation of legitimate expectations can be illustrated within the confines of the following grounds:<sup>630</sup>

**First** is where laws authorising certain decisions contain provisions for the withdrawal and revocation of such decisions. In such situations, revocation or withdrawal of decisions pursuant to such provisions could hardly violate any justified expectations. Examples of this form of explicit statute-based revocations and withdrawals are contained in EU staff regulations, and EU competition law. In **Sorema v High Authority of the ECSC**<sup>631</sup> the court was confronted with a revocation pursuant to article 65 (2) of ECSC treaty. The provision empowers the high authority to allow some form of competition restrictive agreements subject to certain stipulated conditions and further to revoke such agreements where changes occurred rendering the agreements below the stipulated conditions. The court found in favour of the high

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<sup>629</sup> Case 42/59 S.N.U.P.A.T. v High Authority of the European Coal and Steel Company (supra) p. 88

<sup>630</sup> Schwarze considered these grounds as special grounds for revocation while Craig considered most of them as exceptions to protection of legitimate expectations. See: Schwarze (n 91) 1011.

<sup>631</sup> Case 36/64 Sorema v High Authority of the ECSC (1965) ECR 00329 para 4



authority that the conditions for granting the decision ceased to exist and therefore the revocation was justified.

**Secondly**, is where the decision, is subject to revocation at the inception expressly. For instance where EU authorities expressly subject a particular administrative decision to an *“express right to revoke or withdraw”* thereby reserving the right to alter it in future. In the event of exercising such right, it will be deemed in principle, not in violation of any expectations. This is because, the reservation is assumed to have limited or blocked the possibility of generating any legitimate expectations. Most EU temporary decisions are covered under this scenario. Indeed, victims of this form of revocation, most often, do challenge (unsuccessfully) the authorities’ power to revoke such decisions notwithstanding its express mention in the initial decision.

**Thirdly**, EU institutions do revoke their decisions when such decisions are founded on false information. The EU authorities have inherent power to revoke their administrative decisions if they discovered that such decisions came to fruition pursuant to incomplete or fraudulent information. In **SNUPTA** THE ECJ decided that EU authorities can revoke their administrative decisions retroactively where such decisions are reached illegal ab initio or are based on false or incomplete information. In the language of the court:

*"...retroactive withdrawal is generally accepted in cases in which the administrative decision in question has been adopted on the basis of false or incomplete information provided by those concerned."*<sup>632</sup>

The **fourth** instance is where there are changes in legal situation. Changes in legal situation could emanate from EU commission/Parliament or through judicial pronouncement by the ECJ. In the case of *parliamentary-led changes*, it is trite that EU authorities could amend repeal or alter their laws and policies. Such exercise is undoubtedly likely to affect an existing benefit conferred on individuals otherwise amounting to expectations. The problem here lies in the retroactivity of the change introduced by the legislative instrument. While the jurisprudence clearly recognises the power of the EU authorities to change their laws either *conferring right* or *imposing burden* on individuals or economic operators, there is a slight distinction between the two. Where the change simply affects removal of an existing burden for instance levy etc, the court appear to accept such changes as not violating legitimate expectations. However, where the changes appear to deprive a conferred benefit on an individual/economic operator, such as allowances or remunerations, the court appear to evaluate the new legislation against public interest vis-à-vis the private rights acquired pursuant to the old legislation and whether such right was taken into account before the withdrawal or revocation decision. In **Grogan v Commission**<sup>633</sup> The applicant challenged the decision of the commission to reduce his pension from 30,145 Btrs to 13,080 pursuant to a

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<sup>632</sup> Case 42/59 S.N.U.P.A.T. v High Authority of the European Coal and Steel Company (supra) p. 87

<sup>633</sup> Case 127/80 Vincent Grogan v Commission of the European Communities (1982) ECR 869

new regulation. According to the Applicant, since he was retired from service in 1975 (ie prior to the new rule) his pension is governed by the regulation in force at that time, and not the commission's subsequent decision of 1979 and the new rule. The court rejected the applicant's argument against the introduction of the new system. However, on the failure to take into account applicant's legitimate expectations, the court decided in favour of the Applicant. According to the court:

*"...after failing to act for a period extending over a number of years, the Council could not, without failing to protect pensioners legitimate expectations, lay down a transitional period for the progressive reduction of the amounts paid which lasted only ten months. A period of at least twice that length should have been envisaged for that process."*<sup>634</sup>

To clarify further the dynamics of retroactive changes pursuant to legislations, the jurisprudence of ECJ distinguishes between actual and apparent retroactivity.<sup>635</sup> Actual retroactivity refers to a situation where the new rule is sought to apply over a concluded matter or transaction. A change regarding concluded matter which confers benefit is in principle prohibited as it will infringe the notion of legal certainty. Indeed, the exception to this is where the new promulgated legislation sought to remove a burden on an individual. Apparent retroactivity on the other hand, refers to a situation where the new rule sought to be applied is in respect of an on-going matter or

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<sup>634</sup> Case 127/80 Vincent Grogan v Commission of the European Communities (supra) para 34

<sup>635</sup> Alexander H Turk, *Judicial Review in EU Law* (Edward Elgar Publishing Ltd 2010) 131-133.

event.<sup>636</sup> In this scenario, hardly could a legitimate expectations plea succeed.<sup>637</sup>

With regard to changes pursuant to *judicial pronouncement*, ie by EU courts, it is trite that any action or decision declared void by the ECJ ceases to have any legal recognition as it will be “deemed non-existent”.<sup>638</sup> Indeed, the effect of void declaration entails that such an action or decision becomes illegal retroactively. Instances where revocation due to changes in legal situation (pursuant to judicial pronouncement) could arise are successful annulment proceedings or where a purported decision by legislator is challenged by an aggrieved party, or where the validity or otherwise of a particular EU rule is sought to be clarified. In this context, the legal effect of ECJ pronouncements regarding the validity of such contested decision or rule might lead to changes to legal situation. Such changes are bound to be implemented by EU institutions as a matter of law and compliance with such court orders. In practice, the judicial led- changes triggering revocations could in many cases, have retrospective effect while many at times, particularly in decisions conferring benefit be devoid of retrospectivity.

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<sup>636</sup> According to Craig, apparent retroactivity arises where the legal act takes effect for the future, but has an impact on the past events. See: Craig (n 575) 553.

<sup>637</sup> For a detailed discussion on actual and apparent retroactivity, See: Schwarze (n 91) 1120–1122.

<sup>638</sup> Case 22/70 Commission of the European Communities v Council of the European Communities (1971) ECR 0263 para 59

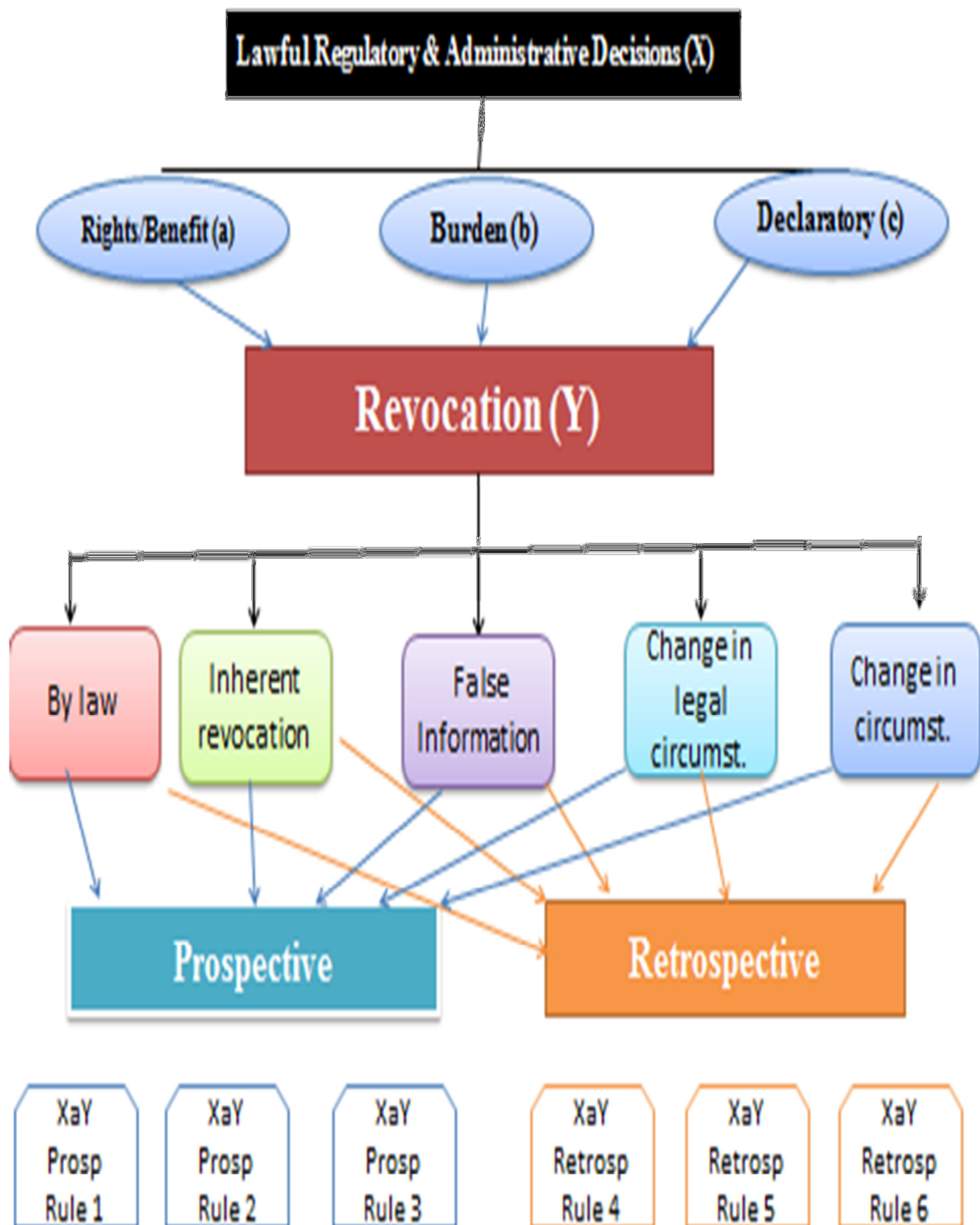
The **fifth** instance is where there is change in circumstance. Indeed many regulatory and administrative decisions are products of circumstance. It follows therefore, where the circumstance that led to the emergence of a decision or underpins its validity changes, the possibility of revocation, replacement or suspension of such decision cannot be excluded. Many at times, revocation due to change in circumstance are dictated by the law in force. Therefore failure by EU authorities not to revoke the decision in question might amount to violation of an operative law in force. More importantly, it is settled principle in EU Law that administrative actions must also comply with relevant laws.<sup>639</sup>

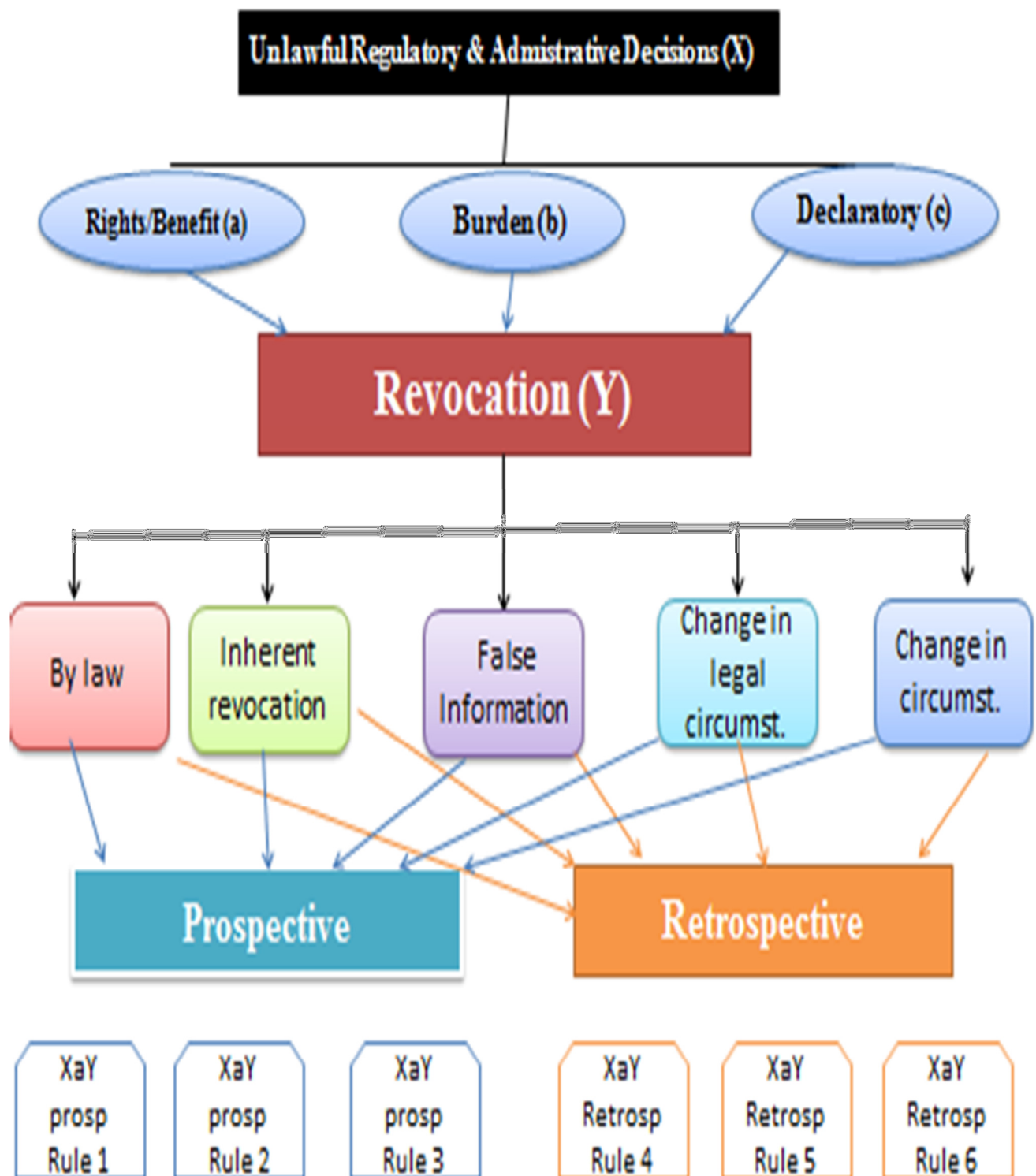
Lastly, revocation/withdrawal is undoubtedly the 'core' element in establishing violation of expectations. Surprisingly however, unlike assurance and reliance elements, the task of establishing revocation and withdrawal appear less tedious compared to the previous elements discussed. An individual or economic operator needs to simply show that EU public institutions changed or altered their decisions. Most often, the EU public institutions hardly challenge the factual assertions as they function mostly through the EU written instruments, except they normally offer purported justifications for their subsequent actions or conducts pursuant to the principles examined *inter alia*. Therefore, the task in revocation analysis is mostly on the Courts and the Advocate general to determine the legitimacy

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<sup>639</sup> Schwarze (n 91) 1023.

and justification of the revocation in dispute on one hand, and further decide whether EU institutions had struck a proper balance between public and private interest involved. The following graphs attempts to capture the interactions between regulatory and administrative decisions in their diverse classifications.







#### **5.1.4 Legitimacy of Legitimate expectations (Balancing) under ECJ**

The process of determining the legitimacy of an alleged expectation is not completely detached from the analysis of identifying the reasonability elements of legitimate expectations. This is because the practice of the court does not clearly demarcate between these two stages. The preoccupation of the court from the legitimacy dimension is whether the alleged (and established) reasonable expectation is fit and worthy of protection. As some commentators argued in this context, this is not simple because an expectation might be sound particularly in the eyes of its beholder, but lack legitimacy due to legal or public interest considerations neutralizing it.<sup>640</sup> Generally, the ECJ case law stipulates that a claim for violation of legitimate expectations that satisfies the required elements of ‘assurance’, ‘reliance’, and ‘revocation’ is likely to be protected except where it is affected by the following factors:

- a. Accompanied by transitional measures/warning:
- b. Devoid of clear obligation with public authorities
- c. Absence of adverse effect
- d. Foreseeable
- e. Tainted by Claimant’s wrong doing
- f. Contrary to the general framework of EU Rules
- g. Contrary to public interest.

#### **a. Transitional Measures/Warning:**

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<sup>640</sup> Wade and Forsyth (n 231) 449.

In **Hellmut Stimming KG v Commission of the European Commission**<sup>641</sup>

the Applicant entered into a contract for the delivery of marinated beef under the EEC Regulations on the common organization of the market in beef and common customs. The same month of the contract a new council regulation was adopted. The new regulation imposed a much higher levy on the Applicant's subject matter of the contract. The Applicant therefore, urged the court to either compel the commission not to levy the importation according to the new regulation, or in the alternative order the commission to pay compensation for the damages caused. The court refused the application, because the commission had put in place a transitional measure. According to the court:

*"Thus, by publishing on page 15 of official journal 1 352 OF 22 December 1976 both the warning to traders concerned and the announcement that the previous arrangements would continue to apply in favour of all those who before a certain date had expressed their intention to make use of them for certain current transactions, the commission had already adopted transitional measures..."*

Therefore, a claim for violation of legitimate expectations is bound to be protected where public authorities altered applicant's reasonable expectations without adopting a transitional measure, where such is relevant. However, in a situation where such transitional measure is likely to conflict with public interest, it will become imperative upon EU authorities to balance between adopting the transitional measure on one hand, and sacrificing it to protect

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<sup>641</sup> Case 90/77 Hellmut Stimming KG v Commission of the European Communities (1978) ECR 0995 para 6

public interest on the other hand. In **Ditta Angelo Tomadini Snc v Amministrazione delle finanze dello stato**<sup>642</sup> the Court subjects the requirement of transitional measures to public interest. According to the court:

*“...the principle of respect for legitimate expectations prohibits those institutions from amending those rules without laying down transitional measures unless the adoption of such a measure is contrary to an overriding public interest.”*

**b. Clear bargain with public authorities:**

The jurisprudence of ECJ has shown that an applicant alleging violation of legitimate expectations must show that the public authorities had entered into some form of bargain resulting into an obligation with them. In many cases, the court had refused to uphold violation of legitimate expectations where the Applicants failed to satisfy this requirement, even though they were undoubtedly affected by such decisions. In **Tomadini supra**, the Italian Court (pretura di Trento) referred the matter to ECJ for interpretation regarding validity of EU regulation introducing monetary compensatory amounts on durum wheat and derived products, which was challenged by the affected applicant before the Italian Court. The ECJ held concerning the need for the Applicant to prove some the presence of obligation as follows:

*“On the other hand, the field of application of this principle cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules in the absence of obligations entered into with the public authorities. This is particularly true in a field such as the common organization of markets, the purpose of which necessarily involves constant*

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<sup>642</sup> Case 84/78 Ditta Angelo Tomadini Snc v Amministrazione delle finanze dello stato (1979) ECR 1801 para 20

*adjustment to the variations of the economic situation in the various agricultural sectors.”*<sup>643</sup>

The court concluded that the content of such and similar regulations are meant specifically for certain economic operators; as such respect for legitimate expectations could not be extended to all other contracts in progress.

Similarly, the ground for clear bargain underscores the underlying basis of legitimate expectations under EU jurisprudence by making the content of expectations to be shared and not unilateral or mere claimants subjective believe. The sense of commitment must flow from the action or conduct of EU public institutions. In **Societe de distribution mecanique et d’automobiles v Commission** The ECJ while rejecting a purported violation of legitimate expectations held that legitimate expectations does not apply to mere “*public statements of a general nature by a member of the Commission or repeated contacts between the person concerned and the Commission*”.<sup>644</sup>

**c. Adverse effect:**

The effect of revocation or withdrawal of a decision pursuant to which a legitimate expectations claim is hinged on the Applicant, is quite significant in the determination of legitimacy of the purported violation of the expectations.

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<sup>643</sup> Case 84/78 Ditta Angelo Tomadini Snc v Amministrazione delle finanze dello stato (supra) para 21

<sup>644</sup> Case C-44/00 Societe de distribution mecanique et d’automobiles v Commission (2000) ECR para 50

Legitimate expectations will not be upheld where the purported violation could not result into a significant change or effect on the Applicant. In **Societe CAM SA v Commission**<sup>645</sup> where the Applicant sought an annulment of an EU regulation concerning measures to be taken due to raise in threshold prices for cereals and rice in respect of those licenses where the import levy or export refund is fixed in advance. The regulation prohibits adjustment of those fixed import levies and export refunds regarding part of the increase in the threshold price. The Claimant argued this violates its legitimate expectations having halted the presumed continuity of the old regulation. The Court concluded that the new regulation could not have adversely affected the Applicants expectations. Similarly in **Westzucker GmbH v Einfuhr-und Vorratsstelle fur Zucker**<sup>646</sup> The case involves amendment to an existing regulation. The old rule in the common organization of the market in sugar provides for the grant of export refund to cover white sugar price disparity between world market and community market, and also adjustment to the amounts fixed for refund. Later, new regulation came up which made the provision for adjustment to the refund amount mere optional. Upon the challenge by the Applicant, the court held that the new regulation that made the adjustment optional did not intrinsically change the positions of the persons concerned, and therefore not repugnant to any expectations or confidence.

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<sup>645</sup> Case 100/74 Societe CAM SA v Commission (1975) ECR 1393

<sup>646</sup> Case 1/73 Westzucker GmbH v Einfuhr-und Vorratsstelle fur Zucker (1973) ECR 0723

#### **d. Foreseeability:**

The ECJ had consistently refused to uphold alleged violations of legitimate expectations because the revocation or withdrawal of the decision culminating into the violation is foreseeable. As mentioned earlier, the relevant foreseeable test adopted by ECJ is “the prudent economic operator test”. The context in which legitimate expectations features, is also crucial from the case law. While an expectation may appear legitimate in the context of EU/staff relationship, it may not possibly pass the threshold of foreseeability test in the context of economic management in the EU market. The threshold for foreseeability test in economic sector is quite high. In **CSL Behring GmbH v European Commission and European Medicines Agency**<sup>647</sup>, The Applicant challenged the decision of the European Medicines Agency (EMA) for refusing to designate its medicinal product as “orphan medicinal product”. EMA’s decision was predicated upon the fact that the Applicant had already obtained marketing authorisation for the product and therefore the Application for the designation was invalid pursuant to Regulation No 141/2000. The Applicant instituted an action challenging both the refusal decision and the Regulation relied upon by EMA, on the ground of (among other things) violation of legitimate expectations and equality. The Court rejected the Applicants arguments and held:

*“...even if a competing undertaking were to obtain market exclusivity for an orphan medicinal product recognised in the member states throughout the European Union, such a limitation, based on considerations connected with*

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<sup>647</sup> T- 264/07 CSL Behring GmbH v European Commission and European Medicines Agency (2010) ECR 00000

*public health, could not infringe the principle of legitimate expectations. The court considers that a prudent and discriminating trader must be in a position to foresee that, in a field such as that of the research and development of effective treatments for patients suffering from rare diseases, The European Union legislature may be called upon to encourage research, inter alia, by way of the award of market exclusivity to a pharmaceutical undertaking which has developed the treatment with the most significant benefit.”*<sup>648</sup>

Indeed, CSL underscores the breadth of “foreseeability” having alluded to its connection with public interest. In **Van den Berg en jurgens Bv and Van Dijk Food Products v Commission**<sup>649</sup> the Applicants instituted an action against “Christmas butter” scheme which provides for disposal of butter at a reduced price. The scheme was a temporary intervention measure by the commission introduced due to the large quantities of butter in the market. The scheme was criticized and its efficiency was questioned even by the commission. However, upon the expiry of the scheme, after a brief interval, the commission organised similar scheme. The Applicant challenged the second scheme alleging violation of legitimate expectations. According to the Applicant, the commission having publicly and on several occasions criticized the first scheme could not have reasonably reverted to the same scheme. The court rejected the Applicants arguments because they failed to show any undertaking from the commission never to have recourse to the scheme. The Court further held that *“the possibility could not be excluded that a further*

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<sup>648</sup> T- 264/07 CSL Behring GmbH v European Commission and European Medicines Agency (supra) para 98

<sup>649</sup> Case 265/85 Van den Berg en jurgens Bv and Van Dijk Food Products v Commission (1987) ECR 1155

*Christmas butter scheme would be operated and a prudent and discriminating trader ought to have taken that possibility into account.”*<sup>650</sup>

**e. Claimants wrong doing:**

Claimant's wrong doing is a vitiating factor in establishing violation of legitimate expectations. This ground includes cases where the Applicant engages in an illegality, fraud, or other wrongful actions or conducts capable of depriving expectations legitimacy. In **Weidacher v Bundesminister für Land- und Forstwirtschaft**<sup>651</sup>, The Applicant alleged violation of legitimate expectations when the Commission adopted a transitional measure due to enlargement as a result of entry of new member states to EU. The Measure introduced tax on surplus stocks. According to the Commission, the measure was meant to neutralise the economic advantage of the holders of surplus stocks with their competitors within the market and further avert undermining proper functioning of the market. The Applicant aggrieved by the decision alleged violation of legitimate expectations. The Court held that the Applicant could not have been entitled to legitimate expectations of market distortion and speculative profit as the community institutions did not; by act, or omission, create that impression. Similarly in **Sideradria SpA v Commission**,<sup>652</sup> The Applicant who had manifestly exceeded its production quota was fined by the Commission. In an action challenging the fine, the Applicant argued that the failure of the Commission to warn it that it had

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<sup>650</sup>Case 265/85 Van den Berg en Jurgens Bv and Van Dijk Food Products v Commission (supra) para 45

<sup>651</sup> Case C-179/00 Weidacher v Bundesminister für Land- und Forstwirtschaft (2002) ECR I-00501

<sup>652</sup> Case 67/84 Sideradria SpA v Commission (1985) ECR 3983



exceeded its delivery quota was in violation of legitimate expectations. The Court rejected the Applicants argument and held;

*"...it is wrongly based on the principle of legitimate expectations. That principle may not be relied upon by an undertaking which has committed a manifest infringement of the rules in force."*<sup>653</sup>

#### **f. General Framework of EU Rules:**

General framework of EU Rules is another ground which could deprive an applicant, protection of expectations under the ECJ jurisprudence. This ground simply refers to the overall nature of EU rules and procedures in their respective areas of coverage within the EU legal order. The ground further signifies the relevance of policy objectives of diverse sectors covered by EU legal system. In **Hellenic Republic v Commission**<sup>654</sup> The Court reiterate its stance on looking at the nature of EU Rules before deciding whether an expectation should be protected or not. The case involves compliance with state aid grant procedure and whether legitimate expectations could be entertained in the absence of formal decision to that effect. The court held that:

*"...In view of the mandatory nature of the supervision of state aid by the Commission under Article 88 EC, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article..."*<sup>655</sup>

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<sup>653</sup> Case 67/84 Sideradria SpA v Commission (supra) para 21

<sup>654</sup> Case 278/00 Hellenic Republic v Commission (2000) ECR I-03997

<sup>655</sup> Case 278/00 Hellenic Republic v Commission (supra) para 104

Similar conclusion was reached in **Regione Autonoma Della Sardegna v Commission**.<sup>656</sup> The applicant argued that due to the positive correspondence between Italian authorities and the Commission and subsequently the long silence by the commission, they are entitled to legitimately expect that their project was compatible with the common market. The court however, looked at the nature of the procedure laid down for granting compatibility status as follows;

*“...where the formal investigation procedure has been initiated in accordance with the first paragraph of Article 88 (2) E C, it must subsequently have been closed by means of a positive decision in accordance with Article 7 (1) and (3) of Regulation No 659/1999. Therefore it is only once such a decision has been adopted by the Commission and the period of bringing an action against that decision has expired, that a legitimate expectation, as to the lawfulness of the aid concerned can be pleaded...”*<sup>657</sup>

Indeed, the general framework, ground depicts the importance of context of the area where the expectations are sought to be protected. Thus, the need to distinguish between less and highly regulated areas is imperative. The framework in general administrative dealing is not susceptible to changes compared with economic management and administration, such as agriculture, Steel, Competition, Aid, External trade etc.

#### **g. Public Interest:**

Public interest underlies all the factors discussed. The ECJ jurisprudence, unless where there is none, subjects all the legitimacy factors to public interest

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<sup>656</sup> Case T-171/02 Regione Autonoma della Sardegna v Commission (2005) ECR 11-2123

<sup>657</sup> Case T-171/02 Regione Autonoma della Sardegna v Commission (supra) para 65

test. In principle, overriding public interest trumps legitimate expectations. As Trabucchi put it,<sup>658</sup> *"when the public interest so requires there can be no doubt that the interests of individuals, even if they form a group of some size, must take second place."* What this signifies in the ECJ jurisprudence is that expectations that could otherwise be considered legitimate and worthy of protection must pave way to a genuine public interest. In essence, public interests operate as an inherent exception to the protection of legitimate expectations in the ECJ jurisprudence. The scenarios under which public interest features are cases where there is prima facie violation of legitimate expectations but for the justification pursuant to the public interest ground. In practical terms, EU institutions have a burden of disclosing the public interest concerned responsible for making them to alter their decision, policies, or behaviour. Where they failed to disclose, legitimate expectations will trump. In **Firma Anton Durbeck v Hauptzollamt Frankfurt am Main-Flughafen**<sup>659</sup> The applicant (apple importer) had entered into apple importation contract, when the Commission decided to suspend all apple importations from outside EU market with a view to safeguard the objectives of the common Agricultural policy. The Applicant aggrieved by the decision alleged violation of legitimate expectations particularly due to the failure of the commission to provide for transitional measures before the implementation of the

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<sup>658</sup> Opinion of Advocate General in Case 74/74 Comptoir National Technique Agricole (CNTA) SA v Commission of the European Communities (1975) ECR 0533

<sup>659</sup> Case 112/80 Firma Anton Durbeck v Hauptzollamt Frankfurt am Main-Flughafen (1981) ECR 1095

suspension decision. The court rejected the Applicant's argument. According to the court:

*"...in view of the needs which the temporary suspension of imports met, transitional measures which exempted contracts already entered into from the suspension of imports would have robbed the protective measure of all practical effect..."*<sup>660</sup>

The scope of public interest undoubtedly covers vast areas of regulation and administration, such as health, environment, and the overall economy broadly defined. For instance, in **CSL Behring GmbH v European Commission and European Medicines Agency**,<sup>661</sup> The court stresses the relevance of public health nature of the regulation and further prioritizes it over legitimate expectations and equality. Similarly, in **Dieckmann & Hansen GmbH v Commission**<sup>662</sup> The case involves a public decision aimed at protecting consumers and public health. The Applicant entered into a contract to import 9,500 kg of fresh caviar from Kazakhstan on 5<sup>th</sup> March 1999. On 26<sup>th</sup> March 1999, the commission banned importations of caviar from Kazakhstan on consumer protection and public health ground. The Applicant found it impossible to perform the supply contract. Aggrieved by the decision of the Commission, the Applicant alleged violation of legitimate expectations. The Court decided in favour of the Commission as follows:

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<sup>660</sup> Case 112/80 Firma Anton Durbeck v Hauptzollamt Frankfurt am Main-Flughafen (supra) para 5

<sup>661</sup> T-264/07 CSL Behring GmbH v European Commission and European Medicines Agency (supra)

<sup>662</sup> T-155/99 Dieckmann & Hansen GmbH v Commission (2001) 11-03143

*“...the ban on the importation of caviar from Kazakhstan was justified on grounds of the protection of the health of consumers and therefore by an overriding public interest within the meaning of the case law.” (para 80)*

The ECJ engagement with public interest is through the medium of balancing exercise. Indeed, the initial balancing exercise must have been carried out by the relevant public institution, which essentially limits the courts engagement to mere review of the initial balance struck by the public institutions involved. As a commentator opined in this context, *“the purpose of the review exercised by the European court is not to substitute its view of the desired public interest for that of the administrator, but to determine whether the disappointment of an expectation was indispensable for the attainment of that objective.”*<sup>663</sup>

The label of such balancing has attracted academic scrutiny. While the court is not very explicit with a particular label on how it engages with public interest analysis, academic commentaries have swayed between *“proportionality”*<sup>664</sup> and *“significant imbalance”*.<sup>665</sup> Undoubtedly, although the label could be unclear but the scope of the balancing exercise is very much clear. The Court had consistently maintained that in matters of economic management the public institutions enjoy wide margin of discretion. In **Offene Hnadelsgesellschaft Firma Warner Faust v Commission**<sup>666</sup> where the

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<sup>663</sup> Thomas (n 6) 63.

<sup>664</sup> Thomas (n 6). See also Craig, *EU Administrative Law*, 584–585.

<sup>665</sup> Schönberg (n 9) 150.

Schönberg, *Legitimate Expectations in Administrative Law*.

commission decided to ban importation of shrimp from Taiwan while allowing importation from China for much longer period. According to the Commission, the decision was taken to achieve two legitimate objectives of stabilizing the market and implementing external trade policy. The Applicant a shrimp importer from Taiwan alleged violation of the legitimate expectations of 'maintenance of trade relation with Taiwan'. The Court decided in favour of the Commission. According to the Court:

*"...Since Community institutions enjoy a margin of discretion in the choice of the means needed to achieve their policies, traders are unable to claim that they have a legitimate expectation that an existing situation which is capable of being altered by Decisions taken by those institutions within the limits of their discretionary power will be maintained."*<sup>667</sup>

### **5.1.5 Concluding remarks on Legitimate Expectations under ECJ**

The section examined the formulation and application of legitimate expectations under the European Court of Justice. What flows from the examination is, the principle of legitimate expectations is well entrenched in the jurisprudence of the European Court of Justice. Undoubtedly, few, if any, international and supranational legal regimes have such well-developed and extensive jurisprudence on the principle of legitimate expectations. The European Court of Justice seems to have accumulated such wealth of expertise from the developed jurisprudence of its member states. This explains the standard framework for analysis being used by the court and the

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<sup>666</sup> Case 52/81 Offene Hnadelsgesellschaft Firma Warner Faust v Commission (1982) ECR 3745

<sup>667</sup> Case 52/81 Offene Hnadelsgesellschaft Firma Warner Faust v Commission (supra) para 27

rigor with which the entire jurisprudence on legitimate expectations can be identified with.

Indeed, there are lessons to be learned from the ECJ jurisprudence to emerging international and supra-national regimes, particularly in the delicate areas of tension and overlap between protection of legitimate expectations and accommodation of public interest. Investment treaty arbitration in particular, is in dire need of such opportunity, owing to the growing criticisms of arbitral awards as being emasculative to legitimate public interest concerns of host states. Therefore, the methodology adopted by the ECJ in ascertaining legitimate expectations, and the balancing framework between protection of legitimate expectations and accommodation of public interest could provide a useful guidance for investment treaty tribunals.

## **5.2 Legitimate Expectations under European Court of Human Rights (ECtHR)**

### **5.2.1 Legitimate expectations under ECtHR: An Overview:**

The Principle of legitimate expectations is a well-entrenched principle forming part of the jurisprudence of right to property under the European Court of Human Rights. As a key element within the constitutive whole of the

right to property, it has been ubiquitously relied upon in establishing possession as an element of the Convention's property right. In analyzing the Court's approach regarding the determination of individual's legitimate expectations, this section shall trace first the formulation of the principle by the court, the methods adopted by the court in the application of the principle, and lastly conclude by enumerating the factors relevant to the determination of legitimate expectations in investment treaty context.

### **5.2.2 Formulation of Legitimate Expectations under ECtHR**

The principle of legitimate expectations is formulated by the court pursuant to the right to property under the European Convention of Human Rights. Article 1 protocol 1 (A1P1) of the ECHR provides as follows:

*"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and subject to the conditions provided for by law and by the general principles of international law.*

*The preceding provisions shall not, however, in anyway impair the rights of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*



The text of A1p1 above provides for 'possession' as part of property covered by the Convention. The concept of possession above is said to be wide, as it covers broad range of properties such as movable and immovable, tangible and intangible including legitimate expectations. In addition, some commentators regard A1p1 above as 'qualified'<sup>668</sup> or 'weak priority'<sup>669</sup> rights. The article provides for protection against arbitrary interference with possession by states. In the same vein, it recognizes the right of states to control the use of property in accordance with law. Taking into account this textual formulation, the court's approach in interpreting the text also seem to recognize this non-absoluteness of the right to property. In **Sporrong and Lonnroth case**<sup>670</sup> the court outlined the famous "three rules" emanating from A1p1. According to the court:

"...Article (1P1) comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the states are entitled, amongst other things to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose, it is contained in the second paragraph."

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<sup>668</sup> A. Grgic and Others, *The Right to Property under the European Convention on Human Rights and Its Protocols, Human Rights Handbooks No.4* (Council of Europe Publishing, 2007) 5.

<sup>669</sup> Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 203–276.

<sup>670</sup> *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR [61].

In discerning the formulation of the court in the above mentioned case, it is instructive to note that although the court has identified three rules to guide its interpretation of the right to property provision, it is also mindful of the order in which its analysis should start. In the opinion of the court, it must determine first, whether rules two and three have been complied with before determining rule one. This approach of the court shows that the formulation of the right to property pursuant A1P1 is a qualified right. In addition, the three rules or rather the entire provision of A1P1 is interconnected. As the court admits, the rules are not distinctly independent.

Moreover, as pointed out, the court's approach to applying legitimate expectations is premised upon the concept of possession pursuant to the right to property. Possession refers to Applicant's existing possession and not right to acquire possessions. In **Broniowski** the court reaffirmed its conception of possession under A1P1 as follows:

*"The concept of 'possession in the first part of Article 1 Protocol No. 1 has autonomous meaning which is not limited to the ownership of material goods and is independent from the formal classification in domestic law. In the same way as material goods, certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions' for the purposes of this provision. In each case the issue that needs to be examined is whether the*

*circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1.*"<sup>671</sup>

Indeed, the conception of legitimate expectations pursuant to right to property makes the court's application of the principle unique. Unlike ECJ where individuals rely on state measures to induce reliance on the measure, in ECtHR the entire principle is viewed from the prism of rights. Thus, the pre-occupation of the court is not on the elements of the principle, as there is little role of elements, rather on the inherent exceptions and the circumstances under which such exceptions could be justified. The method adopted by the court in evaluating such exceptions is referred to as fair balance, or just balance. As it can be observed, sources of legitimate expectations includes judicial decisions, administrative and parliamentary decisions, legal provisions, registers and zoning plans, actions and conduct of authorities and agreements and contracts between parties.<sup>672</sup>

### **5.2.3 Application of Legitimate Expectations**

As discussed above, central to the application of legitimate expectations by ECtHR is the notion of 'possession' and 'assets'. In **Maltzan and Others v**

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<sup>671</sup> *CASE OF BRONIOWSKI v POLAND* (Application no 31443/96) [129].

<sup>672</sup> Maya Sigron, *Legitimate Expectations Under Article 1 of Protocol No. 1 to the European Convention on Human Rights* (Intersentia Ltd 2014) 101–160.

**Germany** the ECtHR alluded to the connection between legitimate expectations, possessions and right to property. According to the court:

*"An applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions related to his "possessions" within the meaning of this provision. "Possessions" can be either existing possessions or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a "possession" within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfillment of the condition."*<sup>673</sup>

In **Koporky v Slovakia**<sup>674</sup> The Applicant lodged a complaint asking to regain possession of coins collections belonging to his father. The applicant could not succeed in the case, having failed to trace the location of the coins as required by law. Indeed, the crux in the legitimate expectations cases is more on the measures interfering with the peaceful enjoyment of the expectations. On assessing the measures. The court has developed multiple layers of tests with a view to strike a fair balance between fulfilment of the expectations or otherwise.<sup>675</sup> First, the court would enquire whether an interference with peaceful enjoyment is lawfull. The second test is whether the interference is in

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<sup>673</sup> Applications nos 71916/01, 71917/01 and 10260/02 *Maltzan and Others v Germany* [74 (c)].

<sup>674</sup> *CASE OF KOPECKÝ v SLOVAKIA* (Application No 44912/98).

<sup>675</sup> A Mowbray, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights' (2010) 10 Human Rights Law Review 289.

pursuit of legitimate aim. In deciding what constitute legitimate aim in the public interest, states enjoy wide margin of respect. The third factor being considered by the court is whether fair balance has been struck at the initial revocation decision. Fair balance in this regard entails that the interest of the individual affected must be evaluated with the interest of the general public. Such exercise is necessary to ensure that disproportionate measures are not imposed on individuals. Indeed, a step further in the fair balancing test would introduce the doctrine of margin of appreciation. As discussed in chapter II, the doctrine, through its functional elements of deference and proportionality would enable the court to decide the matter accordingly. In the determination of legitimate expectations pursuant to A1p1 the court accords high measure of deference to public bodies and institutions.

Lastly, compensation though part of the initial fair balancing exercise, need to be paid to an individual victim of an infringement or deprivation of peaceful enjoyment of property. The basis for recognizing compensation at the initial stage of fair balancing exercise is due to the fact that the human rights regime recognises that there are overriding public interest demands that must be fulfilled, and legitimate expectations not matter how in size must Pave way to their realisation.

#### **5.2.4 Concluding remarks on Legitimate Expecatations under ECtHR**

The jurisprudence of ECtHR on legitimate expectations is undoubtedly one of the most sophisticated and pioneer regimes where legitimate expectations is being considered. The practice of the court regarding fair balance and consequent application of the doctrine of margin of appreciation are the main lessons to be transposed to investment treaty arbitrations. Unlike the ECJ jurisprudence where elements of legitimate expectations are the main preoccupation of the court, the ECtHR's approach focusses more on the balancing part of legitimate expectations. In this regard, a whole chapter is dedicated to the doctrine of margin of appreciation, and forming part of the analytical framework of this research.

## Chapter VI: Legitimate Expectations in Investment Treaty Arbitration – II:

### *Synthesising the Formulation, Application and Justification*

#### 6.0 Introduction

It is settled practice now that investor's legitimate expectation is a key principle in gap-filling the fair and equitable treatment standard.<sup>676</sup> Facts giving rise to expropriation are also included in the gap-filling function of the principle due to the semblance between the scenarios of both fair and equitable treatment and expropriation. For long, arbitral tribunals and commentators have realised that obligations of both fair and equitable treatment and expropriation '*do not necessarily differ in quality but just in intensity*.'<sup>677</sup> In **Metalclad**, the tribunal considered violation of 'reasonably-to-be-expected economic benefit' an important factor in the determination of an indirect expropriation. The blurry dichotomy among not just expropriation and fair and equitable treatment, but the entire investment treaty standards

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<sup>676</sup> *Saluka Investments BV (The Netherlands) v The Czech Republic – Partial Award* (Watts, Fortier, Behrens) (n 15) [302].

<sup>677</sup> Katia Yannaca-Small, *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 399.

had for long been alluded to by major publicists in the regime.<sup>678</sup> As one tribunal in an obiter commented on the rise and ubiquitous reference to fair and equitable treatment as opposed other standards, it remarked that it was due to *'the fact that other standards traditionally provided by international law might not in the circumstances of each case be entirely appropriate.'*<sup>679</sup> To that extent, the thesis argued that the critical role once played by the treaty standards and to some extent contractual guarantee clauses such as stabilisation clause have now been overtaken by the renaissance of the principle of investor's legitimate expectations. One of the critical problems posed by the application of investor's legitimate expectations and overall investment treaty standards is the interface between investor's protection and states' regulatory and administrative autonomy. The problem is indeed, warping and an old-arching having featured in most of arbitral awards discussed in this thesis. Undoubtedly, the nebulous nature of investor's legitimate expectations further knits the states dual functions of administration and regulation. Both regulatory and administrative functions of states have become interwoven and subject to arbitral scrutiny due to on one hand the inherent close connection between administration and regulation, and the pervasive nature of the principle of legitimate

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<sup>678</sup> Christoph Schreuer, 'Introduction: Interrelationship of Standards' in August Reinisch (ed), *Standards of Investment Protection* (Oxford University Press 2008).

<sup>679</sup> In PSEG, the tribunal held that: 'The standard of fair and equitable treatment has acquired prominence in investment arbitration as a consequence of the fact that other standards traditionally provided by international law might not in the circumstances of each case be entirely appropriate. This is particularly the case when the facts of the dispute do not clearly support the claim for direct expropriation, but when there are notwithstanding events that need to be assessed under a different standard to provide redress in the event that the rights of the investor have been breached.' See; *PSEG Global Inc. & Anor v Republic of Turkey ICSID Case No.ARB/02/5* (n 25) [238].



expectations on the other hand. Therefore, in framing the discourse a little distant from the traditional standards of treatment as usually contained in most bilateral investment treaties, is to beg the question of constituent of this pervading principle and determining the consequent interface of the principle with the regulatory and administrative functions of states. As enquired earlier, what are the criteria for determining investor's legitimate expectations? And what are the factors to be considered in the determination of host state's legitimate regulatory and administrative functions?

Drawing lessons from PCIJ, ICJ, WTO, ECJ, ECtHR and to some extent African and Inter-American Human rights jurisprudence, this chapter seeks to appraise and synthesise the lessons learnt in the formulation and application of investor's legitimate expectations. Complementary to the public law nature of investment treaty regime, the doctrine of margin of appreciation as an analytical tool is deployed to provide further guidance in the reformulation and calibration of the application of investor's legitimate expectations in investment treaty context. The overall aim of the chapter is to respond to the question of *how can investment treaty tribunals formulate and apply the principle of legitimate expectations taking into account state's regulatory and administrative functions.*

The chapter is divided into five broad sections. Section I introduces the chapter by outlining the issues to be covered. Section two provides for formulation of investor's legitimate expectations using relevant conceptual approaches and analogies. Section three synthesises the lessons learnt from the

jurisprudence of various regimes discussed in the thesis. Section four provides for justification of applying legitimate expectations from the prism of margin of appreciation, and section five concludes with possible challenges and recommendations.

## **6.1 Formulation of Legitimate expectations in Investment Treaty Arbitration: The Milieu to Analogies**

The idea of formulation in legal parlance is one of the ambiguous and contested legal paradoxes particularly when sought to be isolated from practical application of law. The idea as to whether law as a discipline, has distinctively recognised 'formulation' as a legal exercise to be engaged by legal scholars, practitioners and jurists in clinical isolation from application of law is opaque. Without delving into the paradox of formulation and application of law, and for the purpose of this thesis, the notion of formulation is aimed at analysing the method of conception of a legal principle adopted by judicial bodies or legal regime. The significance of formulation cannot be over emphasized. As indicated in the introductory chapter, the juridical function of arbitrators is what provokes the relevance of approaches and analogies in the application of law. As Elihu Lauterpacht remarked, '*...international tribunals, by the very nature of the judicial function, are not confined to a purely mechanical application of the law.*'<sup>680</sup> In the context of such

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<sup>680</sup> Lauterpacht, 'The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals' (n 74) 210.

judicial function, and with a view to interpret treaties particularly ambiguous standards like fair and equitable treatment, law-making process is being engaged. More importantly, adjudication of legal principles such as legitimate expectations as opposed to strict legal rules is exponentially amenable to the inherent powers of international tribunals to formulate and apply the principle within their juridical leverage and compelling circumstance. The basis for such exercise lies in the ambiguous nature of the treaty standards and the inevitable gap arising due to the evolutive nature of the treaty standards particularly, fair and equitable treatment standard. In fact, as Douglas rightly pointed out in this context, the principle of legitimate expectations could be regarded as a product of such judicial function, as arbitrators, are likely to prefer legitimate expectations while interpreting fair and equitable treatment than to be guided by less juridical approaches like policy objectives of the treaties.<sup>681</sup> Therefore, in setting the analytical account for reformulation of investor's legitimate expectations this section shall deal with analogical formulation of investor's legitimate expectations.

#### **6.1.1 Analogies in the Formulation of Investor's legitimate expectations**

The nature of obligations assumed by states under investment treaties has generated scholarly debate particularly regarding their source of obligation.<sup>682</sup>

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<sup>681</sup> Douglas (n 242) 84.

<sup>682</sup> For an overview on the analogies, see; Paparinskis (n 335); 'EJIL: Talk! - The Nature of Investor's Rights under Investment Treaties: A Comment on Paparinskis' "Investment Treaty Arbitration and the (New) Law of State Responsibility" <<http://www.ejiltalk.org/the->

In search for the juridical basis, Judge Stephen Schwebel<sup>683</sup> and Professor Andreas Lowenfeld<sup>684</sup> alluded to the customary law stance due to the concomitance of the bilateral investment treaties and the way they impacted on the traditional conception of treatment of aliens under international law. According to Schwebel:

*“Customary international law governing the treatment of foreign investment has been reshaped to embody the principles of law found in more than two thousand concordant bilateral investment treaties. With the conclusion of such a cascade of parallel treaties, the international community has vaulted over the traditional divide between capital-exporting and capital-importing states and fashioned an essentially unified law of foreign investment.”*<sup>685</sup>

The absence of the consistent state practice in the content of the treaties, in addition to the lack of *opinio juris* is undoubtedly a shortcoming to the customary law thesis. Analysing the output of the divergent views surrounding the juridical basis of bilateral investment treaties shows that the regime is still soul searching its basis and nature under international law. Rather than painstaking analysis of the nature of the investment treaties, the analogy school understandably seem to offer plausible Comparism with a view to discern the basis and nature of these treaties. The analogy approach generally compares the nature of the content of investment treaties with closer or analogous legal regimes. A notable clock in the analogy path is

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nature-of-investors-rights-under-investment-treaties-a-comment-on-paparinskis-investment-treaty-arbitration-and-the-new-law-of-state-responsibility/> accessed 21 February 2014.

<sup>683</sup> Stephen M Schwebel, ‘Influence of Bilateral Investment Treaties on Customary International Law, The’ (2004) 98 American Society of International Law Proceedings 27, 27–30.

<sup>684</sup> Andreas F Lowenfeld, ‘Investment Agreements and International Law’ (2003) 42 Columbia Journal of Transnational Law 123, 123–130.

<sup>685</sup> Schwebel, *Justice in International Law* (n 368) 146.

identifying the suitable regime for the analogy. As indicated in the introductory chapter, Human Rights regime provides a suitable base and enjoys an overwhelming support by many publicists in international economic law. Without being repetitive, its suitability lies in the fact that in both regimes, individuals can invoke the rights enshrined in their respective treaties. The human rights analogy in investment arbitration is linked to the conception of investment treaties generally as providing *direct rights* as opposed to *derivative rights*.<sup>686</sup> Apart from human rights analogy, a complementary, yet, a contending candidate within *right* analogy is the third party beneficiary theory. i.e *stipulations pour autrui*. The suitability of the theory is predicated upon the conception of bilateral investment treaties as treaties conferring rights on third parties, something analogous with treaties conferring rights on third party states.

#### **a. Legitimate expectations from Human Rights Analogy**

The human right approach to investment treaty arbitration analogises the nature of rights conferred upon foreign investors by bilateral and multilateral

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<sup>686</sup> The argument regarding the nature of investor's rights pursuant to investment treaties led to the emergence of two theoretical schools namely derivative and direct models. Derivative model as an extension of 'diplomatic protection system' connotes that foreign investors do not have a right of their own in investment disputes, but are merely stepping into the shoes of their home states to enforce the right of their home states. In *Loewen Group v United States of America* the tribunal expressed derivative theory as follows: 'There is no warrant for transferring rules derived from private law into a field of international law where claimants are permitted for convenience to enforce what are in origin the rights of Party states.' *Loewen v. United States of America ICSID Case No. ARB(AF)/98/3* (n 271) [para 233] Direct theory on the other hand is premised upon the recognition that states can confer rights on individuals and private entities pursuant to investment treaties. Therefore, investors can be recognised as having individual rights by virtue of their direct relationship with host states, and can therefore institute a claim for the enforcement or seeking remedy regarding their rights. See; *Germany v United States (La Grand) ICJ*, (n 87) [para 77] See also; *SGS Societe Generale de Surveillance SA v Republic of the Philippines ICSID Cases No ARB026* [154].

investment treaties as akin to human rights. In other words, bilateral investment treaties like human rights contain certain guarantees for the benefit of individual parties who are literally neither parties nor signatories to the treaties. One of the early traces of reference to human rights by investment treaty tribunals is **Mondev** tribunal's analysis regarding immunities of public authorities. The tribunal justifies analogy with the decisions of the ECtHR regarding "Right to Court" as providing "*guidance by analogy as to the possible scope of NAFTA's guarantee of 'treatment in accordance with international law including fair and equitable treatment and full protection and security'*".<sup>687</sup>

In **Corn Products International v Mexico** the tribunal unequivocally rejects *derivative theory* and held that investment treaties do confer substantive rights on foreign investor's depending on the intention of the treaty contracting states, which is to be discerned from the treaty text. According to the tribunal:

*"In the case of Chapter XI of the NAFTA, the Tribunal considers that the intention of the parties was to confer substantive rights directly upon investors. That follows from the language used and is confirmed by the fact that Chapter XI confers procedural rights upon them. The notion that Chapter XI conferred upon investor's a right, in their own name and for their own benefit, to institute proceedings to enforce rights which were not theirs but were solely the property of the State of their nationality is counterintuitive."*

Fundamentally, in formulating investor's legitimate expectations pursuant to human rights lens, it is priori to recognise the similarity between the substantive investment rights conferred by investment treaties and the rights

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<sup>687</sup> *Mondev v. United States of America* Case No. ARB(AB)/99/2 (n 269) [144].

of individuals under human rights treaties. Indeed, one of the justifications of using the human rights approach in the determination of legitimate expectations and balancing between protection of same and a justified interference is right and duty parallels. Horizontally,<sup>688</sup> while the foreign investor's right to fair and equitable treatment, including its legitimate expectations need to be fulfilled, the investors also must be accountable.<sup>689</sup> Thus, an adjudicative body, such as investment treaty tribunals need to apply balancing principles in deciding disputes between right beneficiaries and duty holders since the nature of the relationship between the litigants is inherently overlapping from the perspective of right-duty parallels. Secondly, the nature of the obligations is similar in both human rights and investment in that states are responsible for the respect and protection of the rights, and the sovereign powers of the state cannot *prima facie* be used to impair realisation of the substantive rights.<sup>690</sup> Thirdly, as substantive rights under human rights are not absolute,<sup>691</sup> so are investor's rights under investment treaties. The non-absoluteness of the rights presupposes the need for reconciling fulfillment of the rights with public interest demands.

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<sup>688</sup> The horizontal human rights approach seeks to establish duties private actors owe to the society. See; John H Knox, 'Horizontal Human Rights Law' (2008) 102 *American Journal of International Law* 1, 1-47.

<sup>689</sup> Francioni (n 3) 739.

<sup>690</sup> Rehman (n 64) 4.

<sup>691</sup> Dr Richard Burchill, Dr Scott Davidson and Dr Alex Conte, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (Ashgate Publishing, Ltd 2013) 39; In the context of investment, see; Montt (n 50).

Moreover, from the discussion on the jurisprudence of ECJ and ECtHR, the overall recognition of legitimate expectations as possession under right to property by the ECtHR solidifies the case for analogy in formulating investor's legitimate expectations from the prism of human right. As discussed above, the ECtHR pursuant to Article 1 protocol 1 of the ECHR has formulated possession to include legitimate expectations of an individual. Therefore, an investment treaty tribunal can transpose the reasoning of conceiving generality of benefits/rights given to the foreign investor as contained in investment treaties as falling within the umbrella of benefits a foreign can legitimately expect.

***b. Legitimate Expectations as 'stipulations pour autrui'***

In advancing the thesis that international investment treaties in themselves and in their own right contain a joint manifestation of the will of the contracting states the basis upon which investor's legitimate expectations could be generated, the analogy here, viewed investor's legitimate expectations as analogous to stipulations by states where foreign investors are likened with third party beneficiaries of a conferred right. There are two scenario layers to this analogy. First, the content of investment treaty standards as contained in the treaties could galvanise investor's legitimate expectations. Therefore, mere fact that states are signatories to investment treaties could trigger reliance on the part of foreign investors violation of



which could be sanctioned and compensated.<sup>692</sup> Secondly, non-treaty actions or conducts of states otherwise referred as “unilateral manifestation of will” could also galvanise investor’s legitimate expectations as is the case with many claims alleging violation of investor’s legitimate expectations.

In drawing analogy from the discussion on general international law, it may be recalled that unilateral manifestation of will by a state is an essential element of unilateral actions. The unilaterality test is said to be satisfied when one, two or more states jointly or collectively manifest their will to be bound by their actions or conduct. According to ILC working group report of 1997:

*“...this characteristic, which is to be seen both in the structure and in the object and content of the acts, leaves ‘plurilateral’ international legal acts, such as treaties, outside the scope of study. But it does not exclude so called ‘collective’ or ‘joint’ acts, inasmuch as they are performed by a plurality of states which do not intend to regulate their mutual relations by this means, but to express, simultaneously or in parallel fashion, as a unitary block the same willingness to produce certain legal effects without any need for the participation of other subjects or ‘parties’ in the form of acceptance, reciprocity, etc.”*

Flowing from the report, it can be discerned that BIT contracting states can mutually express their will to be bound by conferring on investors the guarantees contained in the bilateral investment treaties. Such expression could be understood analogically from the ‘unilateral actions regime’ as a joint or collective act of states making a declaration or giving an assurance to

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<sup>692</sup> In this regard, it is not the signing or entry into the treaty by states that grounds the obligation to respect investor’s expectation, rather, the ability of the investor to relate its expectations with specific provisions of a given treaty. See; *Total S.A. v Argentina Republic* (n 341) [117].

foreign investors. Indeed, as argued in the preceding chapters, the principle of legitimate expectations encapsulates variety of 'expectation-protective' principles which includes elements of *abuse of right*, *acquiescence*, *estoppel*, and *unilateral actions*. In addition, the justification for analogy between state treaty actions and non-treaty actions was for long recognised. In the work of international law commission on unilateral actions of states, same issue was mentioned when a participant remarked that:

*'Since the consent to be bound by a treaty and the consent to unilateral act were both expressions of will of a state, it seemed logical that the same reasons for invalidity should apply to both types of statements.'*<sup>693</sup>

Therefore, the assumption can be said to be fairly settled that international investment treaties, as containing states' will to be bound by the content of the treaties provides an assurance to foreign investors capable of triggering investor's legitimate expectations regarding performance of the entire treaty obligations. The proof of this contention lies with the fact that states could create expectations when their intention to be bound legally is manifested multilaterally, bilaterally or unilaterally. While multilateral and bilateral manifestation of will most often belongs to the pure treaty regime, the unilateral manifestation of state will could as well be analogised with the treaty regime.

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<sup>693</sup> Remark by the Representative of Poland. See 'UN Doc A/C.6/54/SR.25' (1999).

Furthermore, Article 36 (1) of the Vienna Convention on the law of Treaties provides as follows:

*“ A right arises for a third state from provision of a treaty if the parties to the treaty intended the provision to accord that right either to the third state, or to a group of states...”*

Indeed, Article 36 (1), in addition to the above provided further that the third states need to assent to the right conferred upon it, though such assent could be presumed. It must be pointed out, that the issue of “assent”, “consent” by the beneficiary state and presumption of same somehow present a hitch in the analogy path given the fact that while states can give consent in public international law, individuals do not enjoy the same status. However, as argued while remarking on the status of foreign investor in chapter four, the theories of *formalism* and *participation* appear to debunk the traditional docile status of individuals including foreign investors. In addition, it is well settled principle in investment treaty arbitration that investor’s invocation of investment treaty provisions regarding dispute settlement signifies foreign investor’s consent and acceptance to an offer made by states that are parties to an investment treaty.<sup>694</sup> Therefore, where an investor successfully invokes BIT treaty provisions, such invocation can be analogised with the requirement of ‘assent’ under article 36 (1)VCLT, thereby signifying *reliance* as required in the implorations of legitimate expectations.

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<sup>694</sup> Dolzer and Schreuer (n 244) 238–253.

Indeed, the formulation of investor's legitimate expectations as *stipulations pour autrui*, doesn't come as a surprise to a regime whose nature has proved to be problematic, bearing various ascriptions as 'arbitration without privity', 'three-dimensional', 'beast', 'hybrid' etc. In **Wintershall AG v Argentina** the tribunal in express terms likened foreign investor with 'third state' covered by Articles 34, 35, 1 and 36 of the VCLT. According to the tribunal:

*"It is a general principle of the law of treaties that a third beneficiary of a right under it must comply with the conditions for the exercise of the right provided for in the treaty or established in conformity with the treaty. On the analogy of Article 36 (2) of the Vienna Convention on the Law of Treaties of 1969 (the "Vienna Convention"), the 'secondary right-holder under a bilateral treaty (the investor) who is conferred certain rights, being in no different position from "the third state" (mentioned in Article 36)-must comply with the conditions stipulated for the exercise of the rights provided for in the treaty concerned, which in the instant case is the "basic" treaty.'"*<sup>695</sup>

Conversely, the principle of investors' legitimate expectations can be conceptually formulated from public law approach without relinquishing the public international law identity of the investment treaty arbitration. Pursuant to public law approach, human rights analogy can further illuminate the juridical formulation from property *right based* analogy. As Naon remarked in **EnCana**:

*"...the legal entitlement in such legitimate expectations presents itself in the form of ownership or "propiedad" rights directly protected by the Treaty and is not premised on the national law of the host State once the investment, that comprises the right to obtain returns on the investment, has been made in accordance with the laws and regulations of the host state."*<sup>696</sup>

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<sup>695</sup> 'Wintershall Aktiengesellschaft v. Argentine Republic, Award' (n 341) 114.

<sup>696</sup> *Partial Dissenting Opinion of Horacio A Grigera Naon in En Cana Corporation v Republic of Ecuador* [2005] Uncitral (LCIA) Case No. UN 3481 [20].

In the next heading, the thesis shall dwell upon the lessons learnt from the analytical survey of various legal regimes considered in the preceding chapters, and how such lessons could aid investment treaty tribunals towards a cohesive and coherent application of investor's legitimate expectations.

### **6.2.1 Lessons Learnt from General International Law**

#### **a. Formulation of legitimate expectations**

The thesis found that the jurisprudence of PCIJ, ICJ and early tribunals analysed in chapter four posits that the principles of abuse of right, acquiescence, estoppel and unilateral declarations are all aimed at protecting legitimate expectations in the interaction among states.<sup>697</sup> The principles are rooted and formulated pursuant to the fundamental principles of equity and good faith.<sup>698</sup> Regardless of various ways good faith as an international law concept manifested itself, the principle of legitimate expectations embodies its manifestations and provides for its practical application.

Situating legitimate expectations under the international law principle of good faith, is a lesson that investment treaty tribunals should entrench in the concretization and development of investor's legitimate expectations. Admittedly, the investment treaty tribunal has captured the essence of this lesson when they refer to the good faith obligation as a basis for invoking

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<sup>697</sup> See Chapter IV (4.1)

<sup>698</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgement*, (n 369) 305.

investor's legitimate expectations while interpreting fair and equitable treatment. In *Tecmed*, the tribunal succinctly refer to legitimate expectations *in the light of good faith principle established by International law*.<sup>699</sup> In *Thunderbird separate Opinion* of late Walde, reference is made to good faith as forming part of the doctrinal structure of investor's legitimate expectations.<sup>700</sup> In *El paso* the tribunal further re-echoed the good faith basis of investor's legitimate expectations. According to the tribunal; "*There is an overwhelming trend to consider the touchstone of fair and equitable treatment to be found in the legitimate and reasonable expectations of the Parties, which derive from the obligation of good faith.*"<sup>701</sup> Therefore, juridical formulation investor's legitimate expectation pursuant to good faith is a lesson that appears to be recognised by the tribunals and should be refined and entrenched<sup>702</sup> into investment treaty corpus juris.

#### b. Application of legitimate expectations

Reflecting on the essential elements of legitimate expectations under investment treaty arbitration, the lessons to be drawn from the jurisprudence of PCIJ/ICJ and other relevant international tribunals discussed under chapter IV suggest that, the element of *Assurance/Conduct/Framework* is

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<sup>699</sup> *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* ICSID Case No. ARB (AF)/00/2 (n 24) [54].

<sup>700</sup> *International Thunderbird Gaming Corporation v. United Mexican States* (n 7) [25].

<sup>701</sup> *El Paso Energy International Company v The Argentine Republic* [2011] ICSID Case NoARB0315 [348].

<sup>702</sup> On the refined approach to good faith in the context of investment treaty arbitration, see; AFM Maniruzzaman, 'The Concept of Good Faith in International Investment Disputes - the Arbitrator's Dilemma' (2012) 2012 Amicus Curiae 16.

recognised in both PCIJ and ICJ among all the ‘expectation protective’ principles. In the case of abuse of right, representation or conduct is in the form of existence of the right and exercise of the right.<sup>703</sup> In the case of Acquiescence, the element of assurance or conduct is reflected in the element of silence or toleration.<sup>704</sup> In both estoppel and unilateral actions, the content of assurance/conduct element is effectively the same element as in legitimate expectations *mutatis mutandis*.<sup>705</sup> The unanimous recognition of this element invariably connotes that there should be lessons to reflect on by investment treaty tribunals. **First**, the tribunals could learn regarding the content of an *assurance/conduct or legal framework*. Some of the key qualifiers ascribed to *assurance/conduct* include clarity,<sup>706</sup> unambiguity,<sup>707</sup> unconditionality and voluntariness of representation in legitimate expectations.<sup>708</sup> In addition, the intention element within the fulcrum of state representation or conduct could at times become problematic. While it is quite easy for adjudicators and arbitrators to look at the preponderance of evidence and surrounding circumstance to decide whether states manifest their intention to be bound by a particular representation or conduct, most often, in the absence of clear and unequivocal representation, states could question whether they intend to

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<sup>703</sup> *Free Zones of Upper Savoy and District of Gex (France v. Switzerland)* (n 387).

<sup>704</sup> *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) Merits*, (n 415).

<sup>705</sup> *Land and Maritime Boundary between Cameroon and Nigeria, (Cameroon v Nigeria: Equatorial Guinea intervening), Preliminary Objections*, (n 443); *Nuclear Tests (New Zealand v. France) Judgement*, (n 465).

<sup>706</sup> *Land and Maritime Boundary between Cameroon and Nigeria, (Cameroon v Nigeria: Equatorial Guinea intervening), Preliminary Objections*, (n 443) 275.

<sup>707</sup> According to the court; ‘There has been no clear and unequivocal representation by the bondholders upon which the debtor state was entitled to rely and has relied.’ *Case Concerning the Payment of Various Serbian Loans issued in France, Judgement of 12 July 1929*, (n 455) 39.

<sup>708</sup> See Chapter 1V

be bound by certain representations or behaviour. The legal adage is, not all state actions imply an obligation.<sup>709</sup> In this regard, there is lesson to be learnt from the jurisprudence of ICJ regarding unilateral actions analysed in Chapter IV. According to the ICJ in **Nuclear Tests Case**, ‘...*intention confers on the declaration the character of a legal undertaking...*’<sup>710</sup> In **Burkinafaso v Mali** The court reiterated its position by remarking that ‘*it all depends on the intention of the State in question,*’.<sup>711</sup> The nagging question flowing from the lesson above is, how can investment treaty tribunals ascertain the intention of states in a given representation or conduct? One of the arbitral awards discussed in Chapter III is **Thunderbird**, where the Claimant alleged that it reasonably relied on a written official assurances from Mexican officials. Mexico on the other hand denies that its communication raises any expectation to warrant reasonable reliance. The tribunal found that whatever standard it applies be it narrowest or broadest, it could not pathom the claimant’s argument that they ‘*Oficio*’ generated claimant’s legitimate expectations. <sup>712</sup> In the award, the tribunal appear to assume that an intended though ambiguous assurance was given by Mexico against the background of an inaccurate and *incomplete information* from the Claimant. Interestingly, there was no dispute as to the existence of the official written communication addressed to the Claimant. Rather, the dispute was whether the content of such communications constitutes an *intended assurance* capable of being relied upon. Neither the

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<sup>709</sup> *Nuclear Tests (New Zealand v. France) Judgement*, (n 465) [47].

<sup>710</sup> *Ibid* 43.

<sup>711</sup> *Case Concerning the Frontier Dispute (Burkinafaso v. Mali) Judgement*, (n 482) 39.

<sup>712</sup> *International Thunderbird Gaming Corporation v. United Mexican States Mexico* (n 28) [145–148].



tribunal nor the separate opinion of late Walde was ready to determine the dispute from this angle despite the fact that, that was the defence put forward by the Respondent. According to the Respondent; “...*The Oficio was an advisory opinion, not an approval or permit, based on the information provided by EDM in the Solicitud...*”<sup>713</sup> The determination of whether the *Oficio* was meant to be mere advisory and not an approval or permit triggers the role of *intention* in the determination of state representation or conduct as an element in the analysis of investor’s legitimate expectations. Drawing our lesson from ICJ and ILC guiding principles applicable to unilateral declarations, the tribunal could have been guided by the lessons learnt, particularly, by taking into account the content of the *Oficio*, factual circumstance and the reactions which the *Oficio* gives rise to.<sup>714</sup> Should the tribunal remain doubtful as to the intention of Mexico, a restrictive interpretation would have been in tandem with the ICJ jurisprudence in this area.<sup>715</sup>

With regard to legal framework as a source of investor’s legitimate expectations, undoubtedly, the jurisprudence of general international can strengthen and reinforce part of investment treaty jurisprudence that recognised legal framework set up by host state as a source of investor’s legitimate expectations and analogous to specific assurance or conduct. As

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<sup>713</sup> Ibid 141.

<sup>714</sup> ILC, ‘Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations: ILC Report (58th Session, 2006)’, (n 473) 7; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda) Judgement*, (n 494) [293].

<sup>715</sup> *Nuclear Tests (New Zealand v. France) Judgement*, (n 465) [47]; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits*, (n 488) [261]; *Case Concerning the Frontier Dispute (Burkinafaso v. Mali) Judgement*, (n 482) 40.

discussed in chapter III, there is no unanimity in investment treaty jurisprudence regarding recognition of legal and administrative framework as a source of legitimate expectations. The current state of the jurisprudence though, recognised legal and administrative framework as source for creating legitimate expectations, its use as source of generating legitimate expectations has been relegated and cyclically circumscribed with additional requirements of decisiveness of surrounding circumstance.<sup>716</sup> This ought not to be taking into account that the whole principle of acquiescence and to a certain degree estoppel as developed by ICJ simply applies to state's *passive* behaviour.

Another lesson learnt is regarding the recurrence of conduct and the duration required for a conduct to last before regarding such conduct as capable of rising investor's legitimate expectations. In this regard, the jurisprudence of ICJ requires a conduct or silence to last for a considerable period, or in the case of short period, to occur recurrently<sup>717</sup> before binding a state against its will.<sup>718</sup> This can be quite useful for investment treaty tribunals adjudicating legitimate expectations pursuant to state conduct, particularly where the Respondent is denying either the subjective element of the conduct or the inducement/galvanising force aspect of the conduct. In typical scenario of

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<sup>716</sup> According to Parkerings; '...in the situation where the host state made no assurance or representation, the circumstances surrounding the conclusion of the agreement are decisive to determine if the expectations of the investor are legitimate.' *Parkerings-Companiet AS v Republic of Lithuania ICSID Case No.ARB/05/8* (n 23) [216]; See also *Glamis Gold* where the tribunal held that '...a violation of Article 1105 based on the unseemly of reasonable, investment-backed expectation requires, as a threshold circumstance, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment.' *Glamis Gold v USA* (n 22) [766].

<sup>717</sup> *Grisbadarna Case (Norway v Sweden)* (n 421) 6.

<sup>718</sup> *Ibid* 139.

this, the state would be denying its conduct as short of creating any legitimate expectations. In **Feldman v Mexico**, the tribunal citing *Metalclad* and *Thunderbird* mentioned the relevance of “repeated” nature of an assurance in creating legitimate expectations.<sup>719</sup> Indeed, this lesson can be complemented by the on-going practice of the tribunals regarding measuring the continuum of an assurance or conduct in terms of its level of clarity and specification. It is now an endorsed practice that the less specific an assurance or conduct is, the less likely that it would translate into legitimate expectations.<sup>720</sup>

## 6.2.2 Lessons Learnt from WTO

### a. Formulation of Legitimate Expectations

The research found that WTO law as jurisprudence rooted on a multilateral treaty provides for the contracting states to form legitimate expectations regarding their trade behaviour, maintenance of generalised conditions affecting future trade and overall consistency of the WTO law. These forms of expectations have been clearly covered while discussing the three scenarios of WTO legitimate expectations. The formulation of legitimate expectations under WTO further reveals the role of foundational juridical concepts of good faith and equity. Rooted in the spirit of good faith and equity, the rationale for legitimate expectations is to provide security and predictability of commitments in the multilateral regime. Following the analysis of *contractual-bilateral* and *constitutional-collective* approaches it can be discerned that the

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<sup>719</sup> *Marvin Feldman v Mexico* [148].

<sup>720</sup> *Parkerings-Compagniet AS v Republic of Lithuania ICSID Case No.ARB/05/8* (n 23) [121].

conception of legitimate expectations in WTO is largely developed in the constitutional-collectivism approach.

#### b. Application of Legitimate Expectations

The research found that the application of legitimate expectations under WTO is reflected in cases of violations complains, non-violation complaints, and the status of adopted panel and Appellate body reports. In the case of violation complains although panels were willing to recognize the application of legitimate expectations, the appellate body was unequivocally clear in rejecting the application of legitimate expectations. According to appellate body, the principle of legitimate expectations has no role in the determination of violation complains, having not been mentioned explicitly in the treaty. Non-violation cases appear to be the dominant cause of action of legitimate expectations. Both the panels and the Appellate body in their reports have recognised and applied the principle of legitimate expectations in non-violation complaints. Indeed, the adopted panel and Appellate Body reports do not provide for a substantive cause of action, such reports are however, relevant in generating legitimate expectations and regarded as the central element in providing security and predictability in the overall WTO jurisprudence.

Moreover, like in investment treaty arbitration, the elements needed to establish legitimate expectations include conditions of competition, reliance,

and Nullification/impairment. Conditions of competitions have typified the element of assurance or conduct as a constituent of legitimate expectations in investment treaty arbitration, while nullification and impairment is synonymous with the revocation element of typical legitimate expectations claims under investment treaty regime.

First, one of the lessons worthy of reflecting in WTO jurisprudence, is the approach of the panel in identifying the benefit / condition of competition which is the core of all legitimate expectations pleas. In EC-LAN discussed in chapter four, the panel resolved the of presumptive ambiguity regarding the existence or otherwise of benefit in favor of the party relying on the benefit. According to the panel it will undermine the whole essence of expectations to place the burden of clarifying understanding of representation or conduct on the recipient state.<sup>721</sup>

The jurisprudence of WTO in this regard could be transposed to investment treaty arbitration with a view to fill the gap of interpreting ambiguous representations/conducts. Issues surrounding interpretation of ambiguous assurances or conduct present a lacuna in the investment treaty jurisprudence. As discussed in Chapter three Part of the reasons for separate opinion of Walde in Thunderbird was who should bear the burden of

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<sup>721</sup> EC – Computer Equipment Panel Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June 1998, as modified by Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/ DS68/AB/R, DSR 1998:V, 1891 (n 534) [8.49].

clarifying ambiguous representations in legitimate expectations. In the main award, the majority never considered this aspect as an issue worthy of specific verdict. According to the majority, in an asymmetric relationship, one would expect the moving party i.e. Thunderbird to supply adequate information, though the tribunal navigated the argument by denying ambiguity in Mexico's response to the clarification sought by the foreign investor.<sup>722</sup> Late Walde took it up as cornerstone to his dissent to the Chair and the Co-arbitrator. According to Walde:

*"At issue in dispute-and the main area where I disagree with my colleagues – is whether the conduct of the Government, i.e. SEGOB, the federal gambling directorate, has individually or in its aggregate, created a legitimate expectation for Thunderbird that it could carry out legally its business of computer-driven slot machines involving some measure of skill and human intervention. In this context, the government's duty to avoid ambiguity towards foreign investors, to send clear messages and to proactively correct any misperception manifestly created, to take into account the investor's need for predictability of government conduct and key attitudes is engaged, also its obligation to take its prior assurances into account when "closing" the facilities."*<sup>723</sup>

Indeed, the finding of this thesis regarding the WTO position on the burden of clarifying of ambiguous assurances, concedes to two caveats. First compelling cases of non-disclosure by the foreign investor (where such is required given the asymmetric relationship between the investor and the host

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<sup>722</sup> *International Thunderbird Gaming Corporation v. United Mexican States Mexico* (n 28) [159] The tribunal added at paragraph 164; 'It cannot be disputed that Thunderbird knew when it chose to invest in gaming activities in Mexico that gambling was an illegal activity under Mexican law. By Thunderbird's own admission, it also knew that operators of similar machines (Guardia) had encountered legal resistance from SEGOB. Hence, Thunderbird must be deemed to have been aware of the potential risk of disclosure of its own gaming facilities and it should have exercised particular caution in pursuing its business venture in Mexico. At the time EDM requested an official opinion from SEGOB on the legality of its machines, EDM must also be deemed to have been aware that its machines involved some degree of luck, and that dollar bill acceptors coupled with winning tickets redeemable for cash could be reasonably viewed as elements of betting. Yet EDM chose not to disclose those critical aspects in the Solicitud.'

<sup>723</sup> *International Thunderbird Gaming Corporation v. United Mexican States* (n 7) [21].

state) are unlikely to be affected by this finding. Secondly, contrasting this position with the PCIJ position in *Serbian Loans Case* is likely to produce an incongruous position in the overall international law adjudication. It may be recalled, as discussed in chapter four while dealing with the general international law position on Estoppel, the PCIJ rejected a plea for estoppel on the ground that “*there has been no clear and unequivocal representation*”.<sup>724</sup>

Secondly, as part of the lessons learnt and worthy of transposing to investment treaty arbitration, is the practice of WTO dispute settlement bodies regarding identification of a state measure of revocation of expectations. The approach of the WTO is being driven not by “*state responsibility-centric paradigm*” but a realistic recognition of plurality of players in the market. Both Panel and Appellate body appear unequivocally clear that for a member state to be responsible for violation of legitimate expectations, the nullification or impairment measure must be in form of governmental action, conduct or policy emanating from the state and not that of private parties.<sup>725</sup> The only exception, indeed, is where a private party revocation measure has a governmental flavour.<sup>726</sup> The bottom line here is, the jurisprudence of WTO is strikingly concerned with emblematic adjudication

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<sup>724</sup> According to PCIJ; ‘There has been no clear and unequivocal representation by the bondholders upon which the debtor State was entitled to rely and has relied. There has been no change in position on the part of the debtor State.’ *Case Concerning the Payment of Various Serbian Loans issued in France*, Judgement of 12 July 1929, (n 455) 39.

<sup>725</sup> *Japan – Film Panel Report*, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179 (n 523).

<sup>726</sup> Ibid 10.54.

issues relating to burden of proof<sup>727</sup>, and causation and thereby careful in ensuring that there is causality between responsibility and frustrative measure.<sup>728</sup>

The determination of revocation measure in investment treaty arbitration, as crucial as it is, is in most cases absent or devoid of deserving scrutiny. Most often, the tribunals are concerned with how legitimate expectations are created. Once satisfied that legitimate expectations have been created, they seem to care less to scrutinise evidentiary and with similar dexterity as in the analysis of identification of expectations, how such expectations can be breached. Thus, the issue of burden of proof and causation is being summarily treated and in most cases viewed from the state responsibility angle than the traditional factual ascertainment of fact. A cursory search<sup>729</sup> of all the arbitral awards reveals no result regarding burden of proof or causation in respect of legitimate expectations analysis except in few

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<sup>727</sup> Regarding burden of proof, ‘...we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will unless it adduces sufficient evidence to rebut the presumption.’ Ibid 10.29.

<sup>728</sup> In Japan-Film, the panel remarked in this regard; ‘We consider it important to approach the issue of whether the “measures” in dispute are private or attributable to the Government of Japan with particular care, especially in light of the strong disagreement between the parties as to the nature of certain of these “measures”. We are also sensitive to the possibility that at times it may not be possible to distinguish with great precision a bright-line test of a measure.’ Ibid 10.60.

<sup>729</sup> <sup>729</sup> A simple electronic search of over thirty arbitral awards dealing with investor’s legitimate expectations using search terms such as “burden of proof”, “causation”, reveals less than six matches.



instances. An exception to this arbitral lacunae is thunderbird separate Opinion, where late Walde unearthed this salient aspect of arbitral practice and put it in non-provocative condour as follows:

*"The element of breach in the case of legitimate expectations under Article 1105 of the NAFTA does not consist in the act of creating them, but in the disappointment of such expectations i.e. when a government changes course after the investor made its investment. We need therefore to examine not only how the expectations were created, but also how they were breached."*<sup>730</sup>

Thirdly, a lesson worth reiterating though with caution is the WTO Appellate Body's denunciation of "subjective expectations." Although, this thesis departs from the Appellate body position of rejecting legitimate expectations in violation complaints in toto, the Appellate body's analysis regarding "Subjective expectations" reveals a salient lesson for Investment treaty tribunals. The Appellate body recognizes the subtle nature of legitimate expectations claims, where unintended expectations could find their way through the rubric of the protections accorded by law. Quite expectedly, the practice of investment treaty tribunals is now inclined towards thwarting against such subjective expectations.<sup>731</sup> According to *Toto* tribunal;

*"...legitimate expectations are more than the investor's subjective expectations. Their recognition is the result of a balancing operation of the different interests at stake, taking into account all circumstances, including the political and socioeconomic conditions prevailing in the host state."*<sup>732</sup>

### 6.2.3 Lessons Learnt from ECJ

#### a. Formulation

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<sup>730</sup> *International Thunderbird Gaming Corporation v. United Mexican States* (n 7) [102].

<sup>731</sup> According to Glamis Gold Tribunal; 'a state may be tied to the objective expectations that it creates in order to induce investment.' *Glamis Gold v USA* (n 22) [627].

<sup>732</sup> *Toto Costruzioni Generali S.P.A v Republic of Lebanon* (n 354) [165].

Conceptually, the principle of legitimate expectations is formulated by the ECJ by pursuant to legal concepts of rule of law and legal certainty.<sup>733</sup> While the later entails coherence, stability and planning, the former is concerned more with equality of litigants before the court. Apart from legal certainty and rule of law, the concepts of fairness, equity, trust, and reliance theory have all been mentioned as conceptual underpinnings to the principle of legitimate expectations.

Juridically, the principle has been formulated and described by ECJ in *Case 112/80 Firma Anton* as ‘superior rules of law’ and forming part of the fundamental principles of the community law. More importantly, the court had repeatedly maintained that the principle of legitimate expectations is part of general principles of law of the European community order. In addition, it conceptually remarked that *assurances relied upon in good faith should be honoured*. Thus, the formulation of legitimate expectations by the ECJ is pursuant to the firmly rooted concepts of general principles of EU law, Rule of law, Legal certainty, Trust, Confidence, and equity and fairness.

Reflecting on the formulation of legitimate expectations by investment treaty tribunals, particularly, the early tribunals that grappled with the principle, they seem hesitant to justify the application through firmly rooted principles. Rather, they relied on interpretive techniques. The reason is not far-fetched, and can be explained due to the ad-hoc nature of the tribunals, bilateral

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<sup>733</sup> See chapter five supra

nature of the treaties, and the fact that the tribunals appear to confine their task to mere application of the treaties guided by customary rules of treaty interpretation as contained in Vienna Convention on the law of treaties. It is in this context, that reference by the tribunals to good faith obligation in formulating legitimate expectations is understood.<sup>734</sup> Thus, in addition to formulating the principle of legitimate expectations pursuant to good faith obligations, a lesson to be transposed is to complement the good faith formulation and explore other relevant jurisprudential concepts to aid in accommodating varied conceivable scenarios of legitimate expectations.

### c. Application of Legitimate Expectations

The application of legitimate expectations by ECJ is one of the most illuminating discoveries of this research. The research found that ECJ has two distinct tests in its analysis of legitimate expectations. First, the court applies “*prudent economic operator*” tests to ascertain the reasonability of an alleged expectations. Secondly, the court applies “*balancing test*” to determine whether there are valid policy reasons in departing from protecting legitimate expectations by public bodies.<sup>735</sup>

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<sup>734</sup> *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* ICSID Case No. ARB (AF)/00/2 (n 24) [154]; *International Thunderbird Gaming Corporation v. United Mexican States Mexico* (n 28) [147]; The SPP tribunal refers to ‘established principles of international law’ See; *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* ICSID Case No. ARB/84/3 [82–83].

<sup>735</sup> See Chapter four sections 4.3.1 and 4.3.2 respectively.

Regarding the elements of legitimate expectations, like investment treaty requirements, legitimate expectations must consist of *Representation/Conduct, Reliance, Revocation resulting in damages*. Part of the lessons learnt includes; first, evaluation of the content of representation element. The jurisprudence of ECJ has set a minimum test regarding ascertainment of representation or conduct capable of creating legitimate expectations. In **Societe de distribution mecanique et d' automobiles v Commission**, the court held that assurances, conduct or representations must at the minimum reach the level of "*creating a pardonable confusion in the mind of a person acting in good faith and with all the diligence required of a normally informed businessman.*"<sup>736</sup> In addition, silence is incapable of giving rise to expectations in circumstances where clear and specific response is required,<sup>737</sup> and where an applicant is relying on a conduct as basis for reliance, the claimant has a burden to show that the conduct is consistent.<sup>738</sup>

Reflecting on the requirements of representation/conduct under investment treaty arbitration, the tribunals do not dwell much in considering whether a representation or assurance rises to the level of inducing reliance. Unlike ECJ where most of the legitimate expectations cases thrown out by the court are due to the failure of the claimants to satisfy the '*minimum pardonable confusion test*'. As discussed in chapter five, the test is regarded as the most

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<sup>736</sup> Case C-44/00 *Societe de distribution mecanique et d' automobiles v Commission* ECR I-11231 [50].

<sup>737</sup> *Jean - louis Chomel v Commission of the European Communities* [1990] ECR II-00131 [27].

<sup>738</sup> Case T- 20/91 *Helmut Holtbecker v Commission of the European Communities* [1992] ECR II-2600 [53].

herculean *hurdle claimants have found difficult to surmount*.<sup>739</sup> The test could if transposed into investment treaty arbitration immensely aid the tribunals in clarifying the ambiguity surrounding the constituent element of an assurance or representation capable of galvanising investor's legitimate expectations. For instance, in the case **Thunderbird**, the test could have saved the tribunal and the entire regime the peril of separate opinion over what could have been easily tested with magnifying parameters such as the one used by ECJ. It must be admitted though, that the current position of Investment treaty arbitration regarding determination of representation/assurance or conduct is prosperous. In one of the articulated awards regarding the content of the assurances, the position remains thus;

*"...On the one hand, the form and specific content of the undertaking of stability invoked are crucial. No less relevant is the clarity with which the authorities have expressed their intention to bind themselves for the future. Similarly, the more specific the declaration to the address(s), the more credible the claim that such an addressee (the foreign investor concerned) was entitled to rely on it for the future in a context of reciprocal trust and good faith. Hence, this accounts for the emphasis in many awards on the government having given 'assurances', made 'promises', undertaken 'commitments', offered specific conditions, to a foreign investor, to the point of having solicited or induced that investor to make a given investment."*

Secondly, another important lesson from the practice of ECJ is the legal regime regarding revocation or measures capable of frustrating legitimate expectations. The courts jurisprudence in this area as discussed in chapter five navigates around revocation measures that are either lawful or unlawful, measures that either confers benefit or imposes burden, or measures that are

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<sup>739</sup> Craig (n 575) 568.

either prospective or retrospective.<sup>740</sup> The jurisprudence of ECJ in this regard is quite elaborate and prescriptive. In summary, five scenarios are worth recapping as an exception to the liability rule. First, where laws authorising decisions contains provisions for revocation of such decisions, a revocation pursuant to such laws could hardly violate any legitimate expectations.<sup>741</sup> Secondly, where EU authorities expressly retain right to revoke or withdraw a decisions.<sup>742</sup> Thirdly, where decisions are discovered to have been based on false information. Fourthly, where there are changes in legal position. Fifthly, where there is change in circumstance. Revocations outside the aforementioned instances are *prima facie* likely to be in violation of legitimate expectations.

Whether investment treaty regime could attain such level of detailed clarity and sophistication given the bilateral nature of the treaties, the ad-hoc nature of the tribunals, amidst the divergent domestic legal traditions of investment treaty countries is near impossible to project. However, lessons could be drawn, and jurisprudence can be developed over time. Investment treaty tribunals can, part of the lessons learnt from the ECJ, transpose the classification of measures being applied by the ECJ and apply same in arbitrating claims relating to legitimate expectations. In this regard, the position of few arbitral awards that begin to distinguish and qualify the

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<sup>740</sup> See Chapter five section 5.5.3 *supra*

<sup>741</sup> *Case No 36/64 Sorema v High Authority of the ECSC* [1965] ECR 00329 [4].

<sup>742</sup> For instance, in cases of temporary decisions. See Chapter V section 5.5.3

nature of complained measures can be regarded as an exercise in the right direction. In **Mobil v. Canada** the tribunal while distinguishing pure regulatory measure from wilful frustrative measures held that mere change of regulation could not amount to violation of investor's legitimate expectations. According to the tribunal;

*"...Article 1105 may protect an investor from changes that give rise to an unstable legal and business environment, but only if those changes may be characterized as arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standards. In a complex international and domestic environment, there is nothing in Article 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor. Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made. Governments change, policies changes and rules change. These are facts of life with which investors and all legal and natural persons have to live with."*<sup>743</sup>

The last lesson to be drawn from the jurisprudence of the ECJ, are the factors ECJ is considering in refusing to uphold the applicant's legitimate expectations. As discussed in chapter five, a plea for legitimate expectations that satisfies all the essential elements of 'assurance', 'reliance', and 'revocation resulting in damage' would ordinarily be protected by the court, except where the expectation is affected by any of the following factors, namely, transitional measures/warning, Clear bargain with public

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<sup>743</sup> *Mobil Investments Canada Inc & Murphy Oil Corp v Canada* [153]; Similar conclusion was reached in *Continental Casualty v. Argentina* where the tribunal held; 'general legislative statements engender reduced expectations, especially with competentmajor international investors in a context where the political risk is high. Their enactment is by nature subject to subsequent modification, and possibly to withdrawal and cancellation, within the limits of respect of fundamental human rights and ius cogens;' See; *Continental Casualty v Argentina Case NoARB/03/9* (ICSID) [261 (i) ].

authorities, adverse effect, foreseeability, Applicant's wrong doing, General framework of EU rules, and lastly public interest. While detailed discussion on these factors had taken place in chapter V, The totality of the factors signifies the preoccupation of the court with determining legitimacy of expectations and consequent balancing with public interest concerns. The practice of the court regarding the balancing exercise, is to accord wide margin of respect to the public institutions. In justifying its position, the court had repeatedly maintained;

*"...community institutions enjoy a margin of discretion in the choice of means needed to achieve their policies, traders are unable to claim that they have a legitimate expectation that an existing situation which is capable of being altered by Decisions taken by those institutions within the limits of their discretionary power will be maintained."*

This lesson represents one of the core issues pertaining to the research question posed by this thesis. Ie the issue of balancing. Admittedly, however, the recent practice of investment treaty tribunals, have recognized some of the above mentioned vitiating factors militating against the fulfillment of legitimate expectations. First, looking at the issue of *clear bargain with public authorities*, the investment treaty tribunals have repeatedly maintained that exercise of sovereign authority is *a sine quo non* to finding of violation of legitimate expectations.<sup>744</sup> In **Glamis Gold**, the tribunal unequivocally stresses the element of bargain with public authority.<sup>745</sup> In fact, the totality of

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<sup>744</sup> *Duke v. Ecuador Case No. ARB/04/19* (n 73) [358].

<sup>745</sup> According to the tribunal; '...a violation of Article 1105 based on the unsettling of reasonable, investment-backed expectation requires, as a threshold circumstance, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment.' *Glamis Gold v USA* (n 22) [677].



tribunals that rejected formation of investor's legitimate expectations pursuant to legal and administrative framework are (even if not glaringly) are invariably supportive of 'clear bargain factor'.<sup>746</sup> Secondly, the issue of *adverse effect* is similar to '*damages as a result of revocation*'.<sup>747</sup> Thirdly, foreseeability factor is reflected under various elements in the analysis of legitimate expectations by investment treaty tribunals. The tribunal in *Parkerings* for instance refers to 'due-diligence' and 'anticipation'.<sup>748</sup> Fourthly, *Claimant's wrong doing* is one of the most visible factors addressed by investment treaty tribunals, not just in the context of legitimate expectations,<sup>749</sup> but in the entire treaty standards. Fifthly, General Framework of EU Rules is also reflected in the practice of investment treaty tribunals in ensuring that only legitimate expectations not in violation of the host state law are protected.<sup>750</sup> Lastly, *public interest* factor as discussed in chapter V, is the most important factor to being considered by ECJ. The jurisprudence of ECJ as aptly described in Chapter five shows that, the determination of public interest is the rolling point from mere analysis of legitimate expectations to balancing of competing interests. The key lessons regarding court's engagement with public interest in this regard, is the overriding nature of a genuine disclosed public

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<sup>746</sup> *Continental Casualty v Argentina* Case No.ARB/03/9 (n 26) [260]; *PSEG Global Inc. & Anor v Republic of Turkey* ICSID Case No.ARB/02/5 (n 25) [241–242]; *Sempra Energy International v Argentine Republic* ICSID Case No. ARB/02/16 (n 288) [298].

<sup>747</sup> *International Thunderbird Gaming Corporation v. United Mexican States Mexico* (n 28) [147].

<sup>748</sup> *Parkerings-Companiet AS v Republic of Lithuania* ICSID Case No.ARB/05/8 (n 23) 329–332.

<sup>749</sup> According to Walde; 'There is ample jurisprudence that a legitimate expectation protected by Art. 1105 of the NAFTA can not be created if deception, fraud or other illicit means were used to obtain the governmental assurance or other rights obtained from the government in this way.' *International Thunderbird Gaming Corporation v. United Mexican States* (n 7) [112].

<sup>750</sup> *Marvin Feldman v Mexico* (n 702) [149]; *MCI Power Group v Ecuador* Case No. ARB(AF)/03/06 (n 294) [303].

interest,<sup>751</sup> while at the balancing stage, the minimalist review approach to public decisions adopted by the court, with a view to determine ‘*whether the disappointment of an expectation was indispensable for the attainment of that objective.*’<sup>752</sup>

Undoubtedly, public interest considerations is one of the thorny issues raised in the introductory part of this thesis. The practice of ECJ regarding the recognition of public interest concerns in the determination of legitimate expectations is a lesson that can be transposed into investment treaty arbitration. Indeed, quite expectedly, the recent practice of investment treaty tribunals inclines towards allowing public interest issues in the determination of investor’s legitimate expectations. As pointed out in chapter three for instance, the tribunal in *Parkerings* has this to say in this regard;

*“It is each State’s undeniable right and privilege to exercise its sovereign legislative power. A state has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.”*<sup>753</sup>

## 6.2.4 Lessons Learnt from ECtHR

### a. Formulation of legitimate expectations

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<sup>751</sup> *Opinion of Advocate General in Case 74/74 Comptoir National Technique Agricole (CNTA) SA v Commission of the European Communities* (1975) ECR 0533.

<sup>752</sup> See Chapter 5 at 5.5 (f)

<sup>753</sup> *Parkerings-Companiet AS v Republic of Lithuania* ICSID Case No.ARB/05/8 (n 23) [332].

As discussed in chapter five, the jurisprudence of ECtHR is one of the most advanced regarding protection of legitimate expectations. The court, being a human rights court, tasked with adjudicating human rights disputes, views or rather formulates legitimate expectations from the prism of right to property. One of the lessons learnt from the jurisprudence of ECtHR regarding legitimate expectations is the conception of legitimate expectations as right property. This lesson is thoroughly amplified in the analogy section of this chapter where investor's legitimate expectations is presented as right-based principle and therefore deserves no repetition. In elaborating further however, the lesson that investment treaty tribunals could further drive from the conception of legitimate expectations as property right, is the structure of the right as contained in AIP1. The three basic structures as outlined in Chapter V regarding legitimate expectations under ECtHR are; a. Provision for peaceful enjoyment of possessions b. deprivation of possession c. Control of Use in accordance with general interest. The simultaneous formulation of legitimate expectations along with its visible limitations or exceptions under the three rules above, is a lesson for investment treaty tribunals. Notwithstanding the textual nature of AIP1, the tribunals can transpose this lesson interpretively by acknowledging the inherent limitations attached to investor's legitimate expectations. Indeed, this lesson is inadvertently acknowledged by some tribunals, but need to be consciously concretised in the entire regime. In **Total v Argentina** the tribunal held that “...it is clear that

*the principle of legitimate expectations is not absolute and does not amount to a requirement for the host state to freeze its legal system for the investor's benefit;..."*<sup>754</sup>

#### a. Application of Legitimate Expectations

As an embodiment of right, legitimate expectations under ECtHR is required to be concrete. As discussed earlier, it is settled principle that AIP1 applies only to existing possessions. Therefore, mere hope, or belief of possessing property in future would not give rise to legitimate expectations. One of the key lessons from the ECtHR is founding the principle of legitimate expectations pursuant to right to property. In this regard, the tribunals can transpose the three structures contained in AIP1 as it would help in assuaging the tension between protection of investor's legitimate expectations and State's legitimate regulatory and administrative functions.

The most important lessons however, for the purpose of this thesis is the doctrine of margin of appreciation which formed the analytical framework of this thesis. Having discussed the doctrine extensively in chapter two, little can be said about it in this regard. It needs to be reiterated however, that the application of the doctrine in the context of public interest exceptions is the most relevant for the purposes of determining investor's legitimate expectations. A salient lesson in this regard, is the wide margin legitimate expectations attracts in the jurisprudence of ECtHR. Although investment treaty tribunals appear to recognise the need to allocate margin of

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<sup>754</sup> *Total S.A. v Argentina Republic* (n 341) [120].

appreciation to states, such practice need to be concretised clearly and transposed fully from the mature jurisprudence of ECtHR.

The totality of the lessons learnt from all the regimes considered can be transposed into an investment treaty regime. In transposing such lessons, the thesis deploys Saluka benchmark regarding condition precedent for the protection of legitimate expectations in response to the question raised by the thesis. As **Saluka** tribunal put it; “(investor’s) expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances.”<sup>755</sup> In unveiling the reasonableness, legitimacy, and circumstances levels of investor’s expectations, a three-tier formula of ascertainment, determination and balancing (ADB) can be said to emerge in the jurisprudence. The formula, apart from being an extract from the lessons learnt in chapters IV and V, is also a product of resistance to the peril of lumping in arbitral analysis by investment treaty tribunals. As alluded to in Chapter I while dealing with the core problems to this research, ambiguity and inconsistency had taken diabolical tune through analytical lumping by the investment tribunals. One may wonder, what the tribunals mean, when they say for instance, they could not find violation of legitimate expectations. Is it that the expectation isn’t reasonable? not legitimate? Or simply there is public interest demand that trumps the legitimate expectations of an individual or group of individuals?. To this end, the ADB three-tier approach

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<sup>755</sup> *Saluka Investments BV (The Netherlands) v The Czech Republic Partial Award* (Watts, Fortier, Behrens) (n 15) [304].

distilled from Saluka and lessons learnt, and further articulated in this thesis becomes imperative as a gap-filler and coherence builder in the analysis of investor's legitimate expectations.

### **6.3 Application of Legitimate Expectations: The Three Tier Approach**

This section builds upon the answer to the research question above, and seeks to test the answer in the light of analytical account of investor's legitimate expectations presented in Chapter three and the lessons learnt analysed in this chapter. As discussed in the preceding chapters, the principle of legitimate expectations requires that a foreign investor alleging violation of legitimate expectations must present a situation where a state conduct or representation creates reasonable and legitimate expectations on the part of the investor to rely on the said representation, to the extent that should the state fail to honour such representation the foreign investor would suffer damage.<sup>756</sup> The key elements identified from the investment treaty awards reviewed in chapter three are; Representation/Conduct, Reliance, and Revocation resulting in damages. These elements, have now been tested, having been applied in the jurisprudence of ICJ, WTO, ECJ and ECtHR. Therefore, drawing from the jurisprudence of the aforementioned courts particularly ECJ and ECtHR, this section distils three-tier approach as juridical guide for investment treaty tribunals in the application of investor's legitimate expectations. The three tier approaches towards application of investor's legitimate expectations are part of the lessons learnt from the

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<sup>756</sup> *International Thunderbird Gaming Corporation v. United Mexican States Mexico* (n 28) [147].

aforementioned mature regimes. In unveiling the three-tier approach, investment treaty tribunals should determine and assess investors legitimate expectations by cumulatively determining first, the reasonability of investor's expectations, secondly, the Legitimacy of investor's expectations and lastly, balancing the reasonable/legitimate expectations with regulatory and administrative functions of states. The order of at which the three tiers are recommended is for analytical coherence, except where a tribunal is confronted a *prima facie* unlawful expectation.<sup>757</sup> In that regard, the doctrine of judicial economy may dictate against following the recommended order.

#### **a. Ascertainment of Reasonableness of investor's expectations**

As discussed in the preceding chapters, the ascertainment of reasonableness of an alleged legitimate expectation entails that a purported expectation be analysed by subjecting claimant's subjective belief to an objective juridical assessment to enable arbitrators ascertain whether Claimant's subjective belief can withstand the test of objectivity. The procedure for carrying out this task is fact-driven, and most often contextual.<sup>758</sup>

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<sup>757</sup> This is in line with the lesson learnt from the practice of ICJ. In *Oil Platform*, the ICJ was confronted with the determination of 'use of force' which is *prima facie* illegal under customary international law and contrary to the UN Charter. The court started its analysis in a reverse order, at the end of which it decided not to proceed and examine the defense of US regarding margin of respect. See; *Oil platforms (Islamic Republic of Iran v. United States of America)*, *Judgement*, (n 87) [paras 43–44 and 73] See also Chapter II Section 2.3 (a).

<sup>758</sup> While remarking on the contours of the term reasonability in the determination of legitimate expectations, Peterson remarks with reference to practice US courts that: 'When the Court discusses this factor, it usually is considering whether the claimant reasonably relied to her economic detriment on an expectation that the government would not act as it did—that is, that it would not deprive her of the property at issue. Sometimes, however, the Court focuses not on the claimant's reliance, but rather on whether the challenged law permits the Claimant to make some reasonable use of her tangible resource.' Andrea L Peterson, 'Takings Clause:

In distilling reasonability from the lessons learnt in the preceding chapters, the jurisprudence of PCIJ and ICJ regarding *expectation protective principles* clearly sets the tune for transposing well tested elements enabling adjudicators to determine reasonability. In **Temple of Preah**<sup>759</sup>, the ICJ though did not refer to reasonability test directly but underscores the relevance of ‘circumstance’ and ‘reasonable period’ in the determination of acquiescence and by extension the entire ‘expectation-protective’ principles. Similarly, the ILC guiding principles regarding unilateral declarations provides that in determining the legal effect of unilateral declarations, courts must take into account the content of the declaration, the factual circumstance pursuant to which the declaration is made and the reactions to which the declaration gives rise to.<sup>760</sup> In ascertaining reasonableness of legitimate expectations, the jurisprudence WTO alluded to the relevance of objective expectations as opposed to parties’ subjective belief. In ascertaining the objectivity of expectations, the jurisprudence of both Panels and Appellate body is unanimous that “circumstance” under which such expectation is held is vital and must be taken into account. Drawing lessons from the European courts, namely ECJ and ECtHR, provides for the litmus test in assessing reasonability

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In Search of Underlying Principles--Part I--A Critique of Current Takings Clause Doctrine, The’ (1989) 77 California Law Review 0, 1320.

<sup>759</sup> *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) Merits*, (n 415).

<sup>760</sup> ILC, ‘Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations: ILC Report (58th Session, 2006)’, (n 473) Article 7.



of an expectation. Both courts do inquire, whether an *informed, prudent and discriminating person* would have had such expectations.<sup>761</sup>

Distilling further from the lessons learnt, and in recapitulating the framework for ascertaining reasonability of investor's legitimate expectations, the totality of arbitral awards discussed earlier provided for the requirement of reasonableness in the determination of investor's legitimate expectations.<sup>762</sup> In **Duke v. Ecuador** the tribunal developed a detailed framework of defining some of the constituent elements of reasonableness of investor's legitimate expectations. According to the tribunal:<sup>763</sup>

*"The assessment of reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host state. In addition such expectations must arise from the conditions that the state offered the investor and the latter must have relied upon them when deciding to invest."*

Similarly, the tribunal in **Saluka** clearly held that mere claimant's subjective motivations and considerations could not ground plea for legitimate expectations. A similar conclusion was reached in **EDF v Romania**, where the tribunal held that;

*"Legitimate expectations cannot be solely the subjective expectations of the investor. They must be examined as the expectations at the time the investment is made, as they*

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<sup>761</sup> Case C-426/10 *Bell & Rose BV, v Office for Harmonization in the Internal Market (Trademarks and Designs)* (OHIM) ECR 00000 [56].

<sup>762</sup> *Bayindir Insaat Turizm ve sanayi AS v Islamic Republic of Pakistan* ICSID Case No. ARB/03/29 [192].

<sup>763</sup> *Duke v. Ecuador* Case No. ARB/04/19 (n 73) [340].

*may be deduced from all the circumstances of the case, due regard being paid to the host State's power to regulate its economic life in the public interest."*<sup>764</sup>

Therefore, investment treaty tribunals could as a starting point in the ascertainment of reasonability of investor's legitimate expectations begin with identifying an objective 'expectations' that triggers reliance on the part of the foreign investor. In other words, the journey of legitimate expectations should not start with the subjective belief of the claimant, rather with the recognition of an objective 'expectations' or assurance forming the basis of claimant's reliance. It is the state that induces reliance pursuant to an objective assurance/conduct or regulatory and administrative framework.<sup>765</sup> In this regard, the factual determination of an assurance/conduct or regulatory and administrative framework must have been ascertained. Where a claimant failed to show an objective basis for reliance such as '*assurance*' '*promise*' '*conduct*' or '*legal and administrative framework*' worthy of reasonable reliance, the tribunal can easily decide against such plea due to the absence of a fundamental element in establishing violation of legitimate expectations. Although, the analysis is cyclical, but the main task of the tribunal in ascertaining reasonability of an expectation is testing the reasonability of the

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<sup>764</sup> *EDF (Services) Limited v. Romania Case No. ARB/05/13* (n 306) [66].

<sup>765</sup> According to Thunderbird, "...legitimate expectations relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.' *International Thunderbird Gaming Corporation v. United Mexican States Mexico* (n 28) [147]; See; *Mobil Investments Canada Inc. & Murphy Oil Corp v. Canada* (n 726) [152]; In *Glamis Gold*, the tribunal held that; '...a State may be tied to the objective expectations that it creates in order to induce investment.' *Glamis Gold v USA* (n 22) [621].

Claimant's reliance with a view to ascertain how reasonable is the reliance. Indeed, flowing from the totality of arbitral awards considered in this thesis, reasonableness of legitimate expectations can be understood as a combination of subjective knowledge of the Claimant in the light of factual surrounding circumstance and taking into account regulatory/administrative framework, and '*political, socioeconomic, cultural, and historical conditions*' of the host state at the time of making an investment. Investment treaty tribunals can therefore ascertain reasonableness of investor's legitimate expectations by applying *prudent economic operator test* which is basically in tandem with **Duke v Peru** test regarding the experience of the foreign investor, the circumstance at the host state as defined in **Duke v Ecuador** and in the light of subsequent developments alluded to in **Waste Management**. Therefore, while '*prudent economic operator test*' or '*diligent and prudent investor test*' and '*surrounding circumstance*' are mere evaluative tests and filters, the totality of the elements of legitimate expectations discussed in chapter III, ie (Assurance/conduct/framework, reliance, revocation resulting in damage) are the required elements needed to establish reasonable expectations.

#### **b. Determination of Legitimacy of investor's expectations**

Having provided a framework for ascertaining the reasonableness of investor's legitimate expectations, the next tier is the determination of legitimacy of the reasonable expectations. Indeed, both reasonableness and legitimacy elements of expectations are neither completely detached nor

operate in clinical isolation. The concern in the determination of the legitimacy of a reasonable expectations is the justified reasons for departing from protecting such expectations. As part of the lessons learnt from the jurisprudence of the ECJ, two essential factors affecting legitimacy of an expectation are, legal constraints and public interests concerns. In the determination of legal constraints likely to affect the protection of legitimate expectations, the practice of courts reveals that courts do take into account range of factors sanctioned by a given legal order with a view to determine whether such factors could militate against protection of a reasonable expectations. For instance, in the case of EU legal order, factors such as warning/transitional measures,<sup>766</sup> bargain of obligation with public authorities,<sup>767</sup> adverse effect of revocation,<sup>768</sup> Foreseeability of revocation,<sup>769</sup> Applicant's wrong doing/bad conduct,<sup>770</sup> lack of conformity with the general framework of EU rules<sup>771</sup> have all been regarded as legitimate factors depriving reasonable expectations any form of legitimacy. Indeed, while some of the factors are statute based others are products of judicial interpretation.

Reflecting on the above mentioned lessons from the ECJ, investment treaty tribunals can determine the legitimacy of a reasonable expectation by taking

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<sup>766</sup> *Case 90/77 Hellmut Stimming KG v Commission of the European Communities* (1978) ECR 0995 [6].

<sup>767</sup> *Case 84/78 Ditta Angelo Tomadini Snc v Amministrazione delle finanze dello stato* (supra) [21].

<sup>768</sup> *Case 100/74 Societe CAM SA v Commission* (1975) ECR 1393.

<sup>769</sup> *T- 264/07 CSL Behring GmbH v European Commission and European Medicines Agency* (2010) ECR 00000.

<sup>770</sup> *Case C-179/00 Weidacher v Bundesminister fur Land- und Forstwirtschaft* (2002) ECR I-00501.

<sup>771</sup> *Case 278/00 Hellenic Republic v Commission* (2000) ECR I-03997.

into account the above mentioned factors. Traces of most of the factors above are currently reflected in the jurisprudence of investment treaty arbitration. In **Metalpar v Argentina** the tribunal in rejecting legitimate expectations claims compared the fact of the case with classical legitimate expectations cases and concluded thus;

*“In this specific case, there was no bid, license, permit or contract of any kind between Argentina and Claimants, and the Tribunal considers that there were no legitimate expectations entertained by Claimants that were breached by Argentina.”*

The reasoning of the tribunal clearly shows an analytical semblance with ECJ’s *“Clear bargain with public authorities”* factor as decided in *Tomadini*<sup>772</sup> supra. Other tribunals that begin to include some of the afore mentioned legitimacy factors includes *Parkerings*,<sup>773</sup> *Continental Casualty*,<sup>774</sup> etc.

With regard to the second factor, namely *public interest concerns*, the juridical practice discussed in chapters II, IV, and V, shows that such determination involves weighing between protection of legitimate expectations on one hand, and assessment of the public interest on the other hand. Such exercise, invariably unties the third tier for applying investor’s legitimate expectations. I.e balancing.

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<sup>772</sup> Case 84/78 *Ditta Angelo Tomadini Snc v Amministrazione delle finanze dello stato* (supra) (n 750).

<sup>773</sup> *Parkerings-Compagniet AS v Republic of Lithuania* ICSID Case No.ARB/05/8 (n 23) [323 & 332].

<sup>774</sup> *Continental Casualty v Argentina* Case No.ARB/03/9 (n 26) [259].

**c. Balancing investor's expectations with the state's regulatory and administrative functions.**

Having determined the existence of a reasonable/legitimate expectations, in the absence of any genuine public interest concern, the tribunals may likely have no other duty but to protect the proven investor's legitimate expectations. The issue of balancing arises where the host state presents a justification for revocation of investor's legitimate expectations pursuant to a purported public interest concern or the case as presented by the Claimant sought to challenge a state regulatory or administrative measure. This is the scenario that presents the third-tier to the analysis of investor's legitimate expectations.

As discussed earlier,<sup>775</sup> the crux of the public law approach to investment treaty arbitration lies partly in the judicial review function of investment treaty tribunals. For the purposes of this thesis, such function arises when the tribunals are called upon to balance investor's legitimate expectations with host state's legitimate regulatory and administrative functions. In this regard, the doctrine of margin of appreciation fits well with both public law and public international law nature of investment treaty arbitration in general and the application of investor's legitimate expectations in particular. Matters relating to public or safeguarding public interest, such as human rights protection, environmental protections, public health, rising taxes, etc which

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<sup>775</sup> See Chapter II

all fall within the public image of states are the thorny triggers to the genuine quest for balancing between investor's legitimate expectations and state regulatory and administrative functions. As set out in Chapter II, the doctrine of margin of appreciation is undoubtedly one of the sophisticated applicable standards of review engaged by many international adjudicative bodies. It is a suitable balancing tool for adjudication and arbitration. Traces of the doctrine as unveiled, has been found in the jurisprudence of PCIJ/ICJ, WTO, ECJ, and Regional Human Rights adjudicative bodies.<sup>776</sup> It has been used as a criterion for determining the extent to which states particularly within human rights regime may derogate from protected human rights to meet the overridden public interest. As a balancing mechanism, it recognises protection of private right while justifying the host state's right to regulate 'in good faith'. It recognises the autonomy of the state and accorded some flexibility under which state can act for public interest without incurring responsibility. It is applied in such a way that where state crosses a certain threshold or acted in a disproportionate manner, then the holder of a private right can seek legal redress and possibly get compensated.

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<sup>776</sup> For an analysis of factors relevant to the use of margin of appreciation by the ECtHR see; Yourow (n 65); R. St. J. Macdonald, 'The Margin of Appreciation', *The European System for the Protection of Human Rights* (Kluwer 1993); For criticisms surrounding the margin of appreciation, see; Jeffrey A Brauch, 'Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004) 11 *Columbia Journal of European Law* 113, 113; According to Benvenisti the doctrine of margin of appreciation is undermining the universality of human rights, see; Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1998) 31 *New York University Journal of International Law and Politics* 843, 843.

In engaging with the doctrine of margin of appreciation, investment treaty tribunals could pursuant to Article 31 (3) (c) '*systemic integration*' and their inherent adjudicative powers transpose and apply the doctrine in balancing between of investor's legitimate expectations and state's administrative functions. Indeed, the tribunals, in *Methanex*,<sup>777</sup> *Saluka*,<sup>778</sup> and *Tecmed*<sup>779</sup> have all stirred the quest for balancing as opposed to vertical application of investment protections including legitimate expectations. In all the three awards, the tribunals deployed terms such as deference, proportionality and even margin of appreciation without however elaborating on how they should be applied. In *Toto*, *the* tribunal has this to say regarding the relevance of balancing in the context of investor's legitimate expectations;

*"...legitimate expectations are more than the investor's subjective expectations. Their recognition is the result of a balancing operation of the different interests at stake, taking into account all circumstances, including the political and socioeconomic conditions prevailing in the host state."*<sup>780</sup>

a. Deference Balancing in the determination of legitimate expectations:

As discussed in chapter II, deference connotes a balancing between the intrusive powers of investment treaty tribunals and sovereign powers of states. The essence of deference is to delineate the zone of legality where public bodies can function without undue interference by supervisory

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<sup>777</sup> *Methanex Corporation v USA* (n 25) [265].

<sup>778</sup> where the tribunal concluded that 'in determining whether to impose forced administration, the regulator enjoyed a margin of appreciation' see; *Saluka Investments BV (The Netherlands) v The Czech Republic Partial Award (Watts, Fortier, Behrens)* (n 15) [272].

<sup>779</sup> *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States ICSID Case No. ARB (AF)/00/2* (n 24) [122].

<sup>780</sup> *Toto Costruzioni Generali S.P.A v Republic of Lebanon* (n 354) [165].



adjudicative bodies. Contextualizing deference to legitimate expectations scenario entails that where a foreign investor alleges violation of legitimate expectations, and the host state presents a public interest justification for the revocation or frustration of investor's expectations, the tribunals should start first by defining the breadth of deference the host state should enjoy with a view to function as a sovereign state without incurring responsibility. Indeed, unless manifest unreasonableness can be shown, states usually enjoy wide margin in regulating or carrying out administrative functions regarding economic related matters. In this regard, investment treaty tribunals can simply analyse superficially whether a given measure, action or conduct is backed by law. If the answer is in the affirmative, the tribunal may simply proceed to examine other elements relating to proportionality. To reiterate, the balancing aspect in this regard, is between the intrusive powers of investment treaty tribunals as supervisory bodies on one hand, and the legitimate regulatory and administrative powers of states on the other hand.

As **SD Myers** tribunal held in reference to deference to the host state;

*"determination [that Article 1105 has been breached] must be made in light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."*<sup>781</sup>

b. Proportionality Balancing in the determination of legitimate expectations:

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<sup>781</sup> *SD Myers Inc. v. Government of Canada* (n 268) [263].

Although proportionality is a judicial review tool of its own, in the context of margin of appreciation, it is resorted to as one of the dual elements of margin of appreciation. Proportionality connotes balancing between competing interests. As discussed in Chapter II the balancing function of proportionality is to pair between private interest on one hand and overall public interest on the other hand. In applying proportionality to the analysis of investor's legitimate expectations, the tribunals need to apply suitability, necessity and proportionality tests to a given state measure or conduct and further determine whether the measure shall override investor's legitimate expectations or not. In applying suitability test, the analysis requires that the state measure must suit the purpose sought to be achieved by the measure. In applying necessity test, the focus is to ensure that the measure is justified only in the absence of less restrictive measure to achieve the sought objective. Lastly, proportionality entails the actual balancing, taking into account the deference given to the state pursuant to legitimacy test. In **Tecmed**, the tribunal applied both proportionality and deference balancing tests as follows:

*"Although the analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal, without thereby questioning such due deference, from examining the actions of the State in light of Article 5 (1) of the Agreement to determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation. There must be a reasonable relationship of proportionality between the charge or weight*

*imposed to the foreign investor and the aim sought to be realized by any expropriatory measure...*"<sup>782</sup>

#### **6.4 Justification for balancing Investor's Legitimate Expectations with State's Regulatory and Administrative functions**

In justifying balancing investor's legitimate expectations with state's regulatory and administrative functions from the prism of margin of appreciation, the thesis argues that applying margin of appreciation to investor's legitimate expectations analysis should not be seen as an additive to the elements of 'reasonability' and 'legitimacy' of investor's expectations.<sup>783</sup> Rather, while 'reasonability' and 'legitimacy' tests are taking place within the domain of establishing legally protected expectations the Margin of Appreciation balancing should be understood to be taking place at the level of reconciling public interest with a legitimate right. The reason being, the idea of public interest in itself has the potential of becoming 'overriding' in the same manner investor's reasonable and legitimate expectations could either 'trump' or be treated as analogous to absolute right, if not tamed. the following graph illustrates the justification for striking a balance between investor's legitimate expectations and state's legitimate regulatory and

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<sup>782</sup> *Técnicas Medioambientales Tecmed, SA v The United Mexican States ICSID Case No ARB (AF)/00/2* (ICSID) [para 122].

<sup>783</sup> For a reflective argument, see *Glamis Gold* where the tribunal held as follows; '...the Tribunal finds the standard of deference to already be present in the standard as stated, rather than being additive to that standard. The idea of deference is found in the modifiers "manifest" and "gross" that make this standard a stringent one; it is found in the idea that a breach requires something greater than mere arbitrariness, something that is surprising, shocking, or exhibits a manifest lack of reasoning.' *Glamis Gold v USA* (n 66) [617].

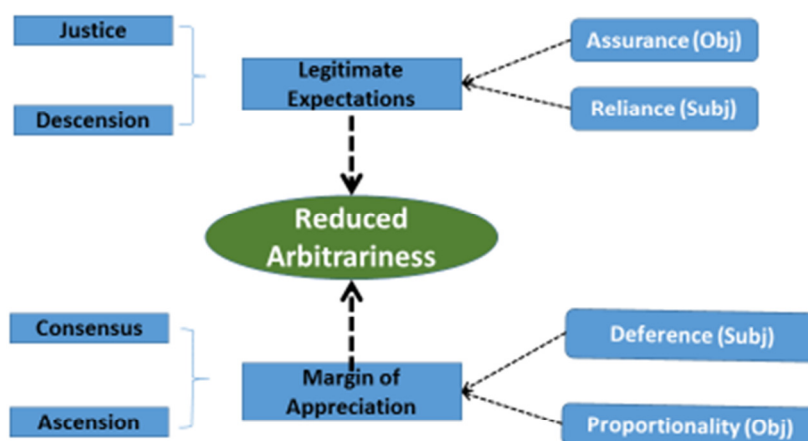
administrative functions and highlighting further the insufficiency of legitimate expectations to balance itself alone without the aid of a balancing tool such as margin of appreciation. In providing the justification, the thesis relies on koskenniemiian illustrations of Objectivity vs Subjectivity, Justice vs Consensus and Descention vs Ascention<sup>784</sup> to aid in conveying the justification findings.<sup>785</sup>

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<sup>784</sup> According to Koskenniemi, an obligation in international affairs can be argued in two ways. "One argument traces them down to justice, common interests, progress, nature of the world community or other similar ideas to which it is common that they are anterior, or superior, to State behaviour, will or interest. They are given normative code which precedes the State and effectively dictates how a state is allowed to behave, what it may will and what its legitimate interests can be. Another argument bases order and obligation on State behaviour, will or interest. It takes as given the existence of States and attempts to construct a normative order on the basis of the 'factual' State behaviour, will and interest. Following Walter Ullmann, I shall call these the 'descending' and "ascending" patterns of justification.' Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 59.

<sup>785</sup> The graph illustrates the outcome of reading margin of appreciation into investor's legitimate expectations. It also explains the interaction of investor's legitimate expectations with margin of appreciation from Koskenniemiian terminologies of justice/descention vs consensus/ascention on one hand, and subjectivity vs Objectivity on the other hand. In Koskenniemiian terminology some principles are products and appeal to justice and therefore descends as a matter of quality. Others are products of and appeal to consensus and therefore ascend in their quality. Here goes the explanation. **Legitimate expectations** as legal principle belongs to justice domain as opposed to consensus. Its appellations to property right, in terms of claim, possession, and entitlement renders its plea as plea for justice. The creation of Legitimate expectations has two cardinal elements, namely assurance and reliance. The determination of existence of an assurance or conduct is objective, as rationality test is engaged in the determination. Acting upon an assurance or conduct is however a product of subjective understanding of the party relying on the assurance. Indeed, the determination of legitimacy of a given expectation would entail objectivisation of the subjective reliance to the level of legitimacy, at which level, objectivity reigns. **Margin of Appreciation** on the other hand as a legal doctrine belongs to the consensus domain as opposed to justice. Its distributive element and appellations of respect, and sub-sumption, renders its operation a product of consensus. It belongs to the domain of understanding, respect, appreciation as opposed to claim of right, possession or entitlement. Operationalising Margin of Appreciation entails engaging its two cardinal functions and elements, namely deference and proportionality. While deference element is subjective (belief), the proportionality element is objective (rationality). Unlike legitimate expectations where legitimacy test is run, there is no step further for margin of appreciation, except balancing which entails both margin of appreciation and legitimate expectations. Therefore, analyzing an objective legitimate expectations from the prism of margin of appreciation with dual objective and subjective tools would result in the reduction or elimination of arbitrariness. The explanation is aimed to show the insufficiency of legitimate expectations alone to balance itself without the aid of legal doctrine such as margin of appreciation. If legitimate expectations were to operate alone

## Reducing arbitrariness is a question of balance



In addition to the above, and having outlined the framework of reasonability, legitimacy and balancing of investor's legitimate expectations, and drawing on the lessons learnt from general international law, WTO, EU law and European Human rights law, the next section advances the justification for balancing investor's legitimate expectations with state's legitimate regulatory and administrative functions from the prism of margin of appreciation.

First, Justice/fairness, could offer a transcendental explanation of balancing between investor's legitimate expectations and state's legitimate regulatory and administrative functions. The appeal to balance competing rights or

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relying on its internal checks, the end result would lead to either 'absoluteness of right' or something similar to 'right trumps'.

obligations by an adjudicative body is an appeal to be fair and just in the determination of a given dispute.<sup>786</sup> In **Vivendi v Argentina** the tribunal captures the appeal of balancing to just and fairness.<sup>787</sup> According to the tribunal;

*"...in interpreting the meaning of fair and equitable treatment to be accorded to investors, the Tribunal must balance the legitimate and reasonable expectations of the Claimants with Argentina's right to regulate the provision of a vital public service."*<sup>788</sup>

Secondly, practical reasons could as well offer justification why tribunals should engage in balancing competing interests or values between foreign investors and host states. Investment treaty tribunals like other international courts or tribunals are required to provide reasons for their findings. As public international law tribunals, they are bound to state at least immediate reasons behind their findings.<sup>789</sup> For instance, Article 48 (3) ICSID provides that *"...award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based."* Some of the reasons offered by international courts generally and investment treaty tribunals include Institutional competence, Democratic legitimacy and Diversity.

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<sup>786</sup> In *Belgian Linguistics Case*, the court caught the glimpse of the transcendental theory as follows: '...The Convention therefore implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter.' *Belgium v Belgium A 6 (1968)*; EHRR 252, (n 95); Similarly, in *Sporrong and Lonnroth v Sweden*, the court further refers to the transcendental just/fairness as follows: '...the court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights...' *Sporrong and Lonnroth v Sweden* (n 121).

<sup>787</sup> See; *Saluka Investments BV (The Netherlands) v The Czech Republic Partial Award* (Watts, Fortier, Behrens) (n 15) [306].

<sup>788</sup> *Suez, Sociedad General de Aguas de Barcelona SA, v The Argentine Republic* [2010] [236].

<sup>789</sup> William Michael Reisman, *The Reasons Requirement in International Investment Arbitration: Critical Case Studies* (BRILL 2008).

a. Institutional competence

Institutional competence as a practical justification to the balancing of investor's legitimate expectations with state's legitimate regulatory and administrative functions from the prism of margin of appreciation recognises that courts and tribunals generally are institutionally incapacitated to engage in scrutinizing complex public interest dimensions of many regulatory and administrative functions of states. In **Glamis Gold**, the Respondent argued that it is not the task of the tribunal to become archaeologists or ethnographers with a view to draw a definitive conclusion. The Tribunal agreeing with this submission held;

*"It is not the role of this Tribunal, or any international tribunal, to supplant its own judgement of underlying factual material and support for that of a qualified domestic agency. Indeed, our only task is to decide whether Claimant has adequately proven that the agency's review and conclusions exhibit a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons so as to rise to the level of a breach of the customary international law standard embedded in Article 1105."*<sup>790</sup>

The above reasoning is a reflection of part of the lessons learnt from the jurisprudence of ECJ in its application of Margin of Appreciation. In **United Kingdom v Council** (Working time Directive) The ECJ while applying the doctrine of margin of appreciation held:

*"The Council must be allowed a wide discretion in an area which, as here, involves the legislature in making social policy choices and requires it to carry out complex assessments."*<sup>791</sup>

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<sup>790</sup> *Glamis Gold v USA* (n 22) [779].

<sup>791</sup> *Case C-84/94 United Kingdom v Council (Working time Directive)* (n 101).

## b. Democratic Legitimacy

Democratic legitimacy entails that public institutions have a legitimate mandate to engage in carrying out certain tasks mandated by law. The source of legitimacy in discharging such public functions is the democratic choices made by people in either electing, appointing, or mandating the public personnel and the institutions to carry out such public tasks. An investment treaty tribunal or any other international tribunal is lacking such mandate. When called upon to adjudicate over a dispute involving legislative or executive measure of a state, a caution or deference is needed to avoid substituting the political choices made of society or their legitimate representatives. One of the reasons alluded to in chapter II in this regard, is while individual members of society reserve their right to express their discontent on political choices made on their behalf against their representatives in democratic polls, they do not possess any retaliatory tool against judicial bodies, particularly, international arbitrators and adjudicators, when the latter meddled into such domestic policies.

Therefore, investment treaty tribunals can justify recourse to the doctrine of margin of appreciation in balancing investor's legitimate expectations on the ground of democratic legitimacy. In **SD Myers**, the tribunal alluded to this justification in the following terms;

*"Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis*



*of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments in through internal political and legal processes, including elections.”<sup>792</sup>*

### c. Diversity

Diversity, pluralism and heterogenous nature of global communities is one of the fundamental justifications why margin of appreciation should be resorted to whenever sovereign functions are to be evaluated by international tribunals. From the framework set out in this research, investor’s legitimate expectations is conceived from human rights prism and as principle not rule.<sup>793</sup> Therefore, diversity in this context breeds flexibility in terms of attaining a commitment including fulfilment of investor’s legitimate expectations. While some of the regimes analysed in this thesis such as WTO, regional human rights law, and EU law have diversity appellations entrenched in their system, investment treaty tribunals (for now) would have to rely on judicial activism to transpose and recognise elements of diversity in the context of balancing between investor’s expectations and state administrative functions. At the heart of diversity justification is the variation in terms of level of development among the comity of nations. The diversity factor can be starkly felt in the context of international investment where a foreign investor, mostly from developed countries enters developing country or economy in transition. The level of regulatory and administrative maturity

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<sup>792</sup> *SD Myers Inc. v. Government of Canada* (n 268) [261].

<sup>793</sup> On the discussion on principles and rules, see Chapter II

in the host state can hardly be compared with that of the home state of the foreign investor. In **Generation Ukraine** the tribunal factored diversity justification and held as follows:

*"...it is relevant to consider the vicissitudes of the economy of the state that is host state to the investment in determining the investor's legitimate expectations,...The Claimant was attracted to the Ukraine because of the possibility of earning a rate of return on its capital in significant excess to the other investment opportunities in more developed economies. The Claimant thus invested in the Ukraine on notice of both the prospects and the potential pitfalls."*<sup>794</sup>

The above mentioned practical justifications are not exhaustive. They however provide a moderate premise upon which investment treaty tribunals could adduce reasons in justifying why the tribunals should apply margin of appreciation with a view to balance investor's legitimate expectations and state's legitimate regulatory and administrative functions.

## 6.5 Conclusion

This chapter presents the answer to the research question raised by this thesis. It may be recalled, that in chapter I, the thesis asked the question of *'How can investment treaty tribunals formulate and apply investor's legitimate expectations taking into account state's legitimate regulatory and administrative functions?'* In answering the research question, the chapter touches on the associated sub questions though most of which had been answered in the previous chapters. Accordingly, in the light of the lessons learnt from PCIJ/ICJ, WTO, ECJ, and ECtHR, taking into account the **Saluka**

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<sup>794</sup> *Generation Ukraine Inc v Ukraine* [2003] [20.37].

**benchmark**, the chapter answers the research question as follows: Investment treaty tribunals can formulate and apply investor's legitimate expectations whilst taking into account state's legitimate regulatory and administrative functions by:

- a. Ascertaining the reasonableness of investor's legitimate expectations
- b. Determining the legitimacy of investor's legitimate expectations
- c. Balancing between legitimate and reasonable expectations on one hand and legitimate regulatory and administrative functions of states on the other hand by applying the doctrine of margin of appreciation.

In ascertaining the reasonableness of investor's legitimate expectations, the tribunals shall be guided by 'diligent and prudent investor' test. In determining the legitimacy of investor's expectations, the tribunals shall be guided by identification of legal constraints and public interest concerns that could militate against the fulfillment of investor's legitimate expectations. Lastly, in balancing between investor's expectations and state's legitimate regulatory and administrative functions, the tribunals should apply the doctrine of margin of appreciation as a balancing tool taking into account the doctrine's dual functions of deference and proportionality.

## **Chapter VII: Summary of Findings, Contribution & Conclusion**

### **Summary of Findings:**

Against the background of inconsistent and incoherent formulation and application of investor's legitimate expectations, the thesis formulated the research question of how can investment treaty tribunals formulate and apply investor's legitimate expectations, taking into account host states' regulatory and administrative functions. At the heart of the research question is the doctrine of margin of appreciation considered in this thesis as a balancing tool. The doctrine, as argued in the thesis, can through its dual balancing functions of deference and proportionality enable investment treaty tribunals to first, vertically balance between sovereign powers of states on one hand, and judicial powers of investment treaty tribunals on the other hand. Secondly, the doctrine can horizontally balance between investor's legitimate expectations on one hand, and competing public interests on the other hand. A combination of doctrinal and comparative legal analysis led to analysing the jurisprudence of PCIJ/ICJ, WTO, ECJ, ECtHR, regarding both the doctrine of margin of appreciation and the principle of legitimate expectations. In identifying the key elements of investor's legitimate expectations, the thesis found that investor's legitimate expectations as understood by investment treaty tribunals connotes a situation 'where a state through an assurance or conduct can create a reasonable and justifiable expectations on the part of an investor to act in reliance on the said assurance or conduct; failure by the state

to honour those expectations could cause the investor to suffer damages.’ In distilling the requisite elements needed to establish investor’s legitimate expectations, four essential elements have been established from the arbitral awards analysed in chapter III. These elements are; a. Representation/conduct/legal framework b. Reliance, c. Frustration, d. Damages. The research however, found that there are sub-elements/factors needed to either establish the aforementioned elements or refine their application. Given the developmental stage of investment treaty arbitration as a whole, the thesis deem it fit to search outward the investment treaty regime to transpose the needed element towards refining the principle on one hand, and to identifying a key analytical framework that would enable both the research and investment treaty tribunals to engage in balancing between investor’s legitimate expectations and state’s legitimate regulatory and administrative functions.

From the general international law jurisprudence, the thesis found that the jurisprudence of ICJ regarding legitimate expectations is embedded in various associated principles such as abuse of right, estoppel, acquiescence and unilateral actions and conducts.<sup>795</sup> The totality of the principles has a shared function of protecting legitimate expectations. In formulating the principles, the ICJ relied on the concept of good faith in articulating its jurisprudence regarding the ‘expectation protective’ principles. In applying the ‘expectation-protective’ principles the thesis found that the four identified elements of

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<sup>795</sup> See Chapter IV at 4.1

investor's legitimate expectations are reflected in different forms among the principles. The thesis found that analogy has played a significant role in the jurisprudence of ICJ regarding cementing the minor differences among the totality of the expectations-protective principles. With regard to the application of margin of appreciation, the thesis found that the jurisprudence of both PCIJ and ICJ provides for the principle of margin of appreciation. In the plethora of cases discussed, both courts have alluded to the horizontal and vertical balancing functions of margin of appreciation.<sup>796</sup>

Regarding the WTO jurisprudence, The thesis found that legitimate expectations are well-embedded in the jurisprudence. The formulation of the principle is pursuant to the concept of good faith and *Pacta Sunt Servanda* provided for under Article 26 VCLT. In addition, the thesis found that the principle of legitimate expectations is conceptually ingrained in the Constitutional/collectivism approach. As discussed,<sup>797</sup> the approach views expectations of trade-related behaviour as the core in the WTO jurisprudence. With regard to the application of legitimate expectations, the research found that the application of legitimate expectations, though featured in three scenarios of violation complaints, non-violation complaints, and adopted panel and appellate body reports, but is mainly invoked in the first two scenarios, namely Violation complaints and non-violation complaints. In addition, the thesis found that the essential elements of legitimate

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<sup>796</sup> See Chapter II at 2.4 (a)

<sup>797</sup> See Chapter IV at 4.2.2

expectations are; assurance/conduct, reliance, and revocation resulting in damages. As argued in chapter IV, assurance/conduct in the context of WTO may take the form of benefit accruing to WTO member states, while revocation may be in form of Nullification and Impairment. Moreover, with regard to the doctrine of margin of appreciation, the thesis found that the WTO standards of review functions in a manner analogous with the doctrine of margin of appreciation. The WTO standard of review provides for both deferential and proportionality balancing.<sup>798</sup>

While analysing the jurisprudence of the ECJ, the thesis found that the court formulates and applies the principle of legitimate expectations pursuant to the general principles of European Union Law, and the doctrine of legal certainty. Conceptually, the formulation is justified pursuant to the concept of rule of law. The thesis further finds that in the course of its application of the principle, the ECJ has devised a methodology of ascertaining most of the elements of legitimate expectations with relevant tests to guide the court. For instance, the court evaluates applicant's 'reliance' in the light of "prudent economic operator test". The court also evaluates an assurance/representation or conduct in the light of 'pardonable confusion' test.<sup>799</sup> In addition, the thesis found that there are other factors affecting the legitimacy of expectations which the court usually consider before deciding whether a legitimate expectation must be protected by the court. These factors

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<sup>798</sup> See Chapter II at 2.4 (b)

<sup>799</sup> See Chapter V at 5.1.2

have been dealt with in details in chapter V. Indeed, where issues of public interest are raised, the court embarks on balancing exercise. In carrying such exercise, the court deploys proportionality with wide margin of appreciation to public bodies and EU institutions in economic related matters.

The application of margin of appreciation by the court as indicated above concerns when the court engages in balancing. The thesis found that the court applies the dual functional elements of margin of appreciation, namely, deference and proportionality. In its application of proportionality, the court is concerned with whether a revocation a measure is manifestly inappropriate, and if the measure is in respect of social or economic policies of the EU, the court usually accords wide margin of discretion to public bodies and institutions.<sup>800</sup>

In the context of human rights jurisprudence, the research found that the principle of legitimate expectations is formulated pursuant to the concept of possession under right to property. The jurisprudence of the European Court of Human Rights in this regard helps in recognizing the types of expectations that tribunals should accept and recognize as worthy of claiming legally.<sup>801</sup> More importantly, the thesis found that the legitimate expectations pursuant to right to property are not absolute, rather subject to justified exceptions. In addition, the thesis found that the doctrine of margin of appreciation is

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<sup>800</sup> See Chapter II at 2.4 (c)

<sup>801</sup> See Chapter V at 5.2



largely developed by human rights jurisprudence. In this regard, the jurisprudence of the European Court of Human Rights formed part of the analytical framework of the whole research given its extensive grounding of the doctrine of margin of appreciation.<sup>802</sup>

*Contribution to Knowledge:*

The main task of this thesis has been to make a contribution to the body of knowledge in the formulation and application of investor's legitimate expectations in investment treaty arbitration. The thesis begins by asking the research question of How could investment treaty tribunals formulate and apply investor's legitimate expectations taking into account states' legitimate regulatory and administrative functions. In answering the research question, the thesis deploys the doctrine of margin of appreciation as an intellectual lens to provide a prism through which the principle of investor's legitimate expectations can be analysed. In addition, the thesis made a case for looking at the jurisprudence of the International Court of Justice, the World Trade Organization, the European Court of Justice, and the European Court of Human Rights with a view to transpose lessons learnt from those regimes.

Having reviewed the jurisprudence of the ICJ, WTO, ECJ and ECtHR regarding legitimate expectations and margin of appreciation, the thesis assembled the entire findings regarding the doctrine in Chapter VI. The findings include that the formulation and application of legitimate

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<sup>802</sup> See Chapter II at 2.4 (d) (i)

expectations by the ICJ are rooted in the principle of Good Faith. In that regard, all good faith related principles share a common function of the fulfillment of expectations reasonably relied upon in good faith. The thesis also found that the jurisprudence of the WTO also applies the doctrine of legitimate expectations. Both Appellate body and Panel have formulated the principle pursuant to good faith and applied the principle accordingly. The jurisprudence of both ECJ and ECtHR also proves that the principle has been extensively applied by the two European Courts. The formulation of the principle by the ECJ was pursuant to rule of law and general principles of EU, while the ECtHR was pursuant to right to property.

The first contribution of this research to the existing knowledge of investor's legitimate expectations is in the formulation of the principle. Little attention is being paid to the process of formulation of legal principle. As the thesis proves, the principle of legitimate expectations can be formulated as right-based principle. Two right-based approaches have been discussed in chapter VI. These approaches are human rights analogy and third party beneficiary analogy. Both approaches as argued in the thesis, harmonizes with public law approach and public international law identity of investment treaty arbitration regime. Therefore, investment treaty tribunals could pursuant to the two analogies of human right and third party beneficiary analogy formulate the principle of investor's legitimate expectations.

The second contribution to the existing body of knowledge is on the application of the principle of legitimate expectations. The thesis contributes three-tier approaches or steps in the application of investor's legitimate expectations. The first tier requires investment treaty tribunals to ascertain the reasonability of investor's legitimate expectations. The second tier requires the tribunals to determine the legitimacy of the expectations. While the third tier requires the tribunal to balance the competing interests brought before the tribunal. Thus, the three tiered approach resides in the acronym of "ADB". Meaning, Ascertain, determine, and balance between the protection of investor's legitimate expectations on one hand, and allowing public interest policy dimension to override the legitimate expectations on the other hand.

The third contribution to the existing body of knowledge is the three-tier approach, and justification/theoretical justification provided by this research. In chapter VI, two sets of justifications were provided for balancing between investor's legitimate expectations and State's legitimate regulatory and administrative functions.

Lastly, though discovered in Chapter II, the thesis provided two sets of contributions in the refinement of the doctrine of margin of appreciation. The first contribution is the identification of the dual functional elements of the doctrine of margin of appreciation namely, deference and proportionality.<sup>803</sup>

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<sup>803</sup> See Chapter II at 2.2

The second contribution is on the theoretical basis of the doctrine.<sup>804</sup> In chapter II, the analytical framework has been theorised into three levels of theory consisting of practical theory, pure theory, and transcendental theory.

### **Conclusion and Further Research:**

The ubiquitous reference to investor's legitimate expectations in investment treaty arbitration is one of the fundamental reasons why an exclusive study and research of the principle is regarded as paramount. The research reveals that the application of the principle of legitimate expectations is not limited to investment treaty arbitration. Other international courts and tribunals have all either directly or indirectly applied the principle accordingly. Indeed, the omnipresence of the principle in the generality of international law corpus leaves little doubt that such pervasive principle must have either been recognised as a general principle of law or is near recognition given its significance role in the supranational adjudication and arbitration .

However, there are areas identified for further research. One of such lurking areas worth exploring is how the conception of legitimate expectations pursuant to right to property could illuminate the notion of investment under ICSID in particular, and general international investment law. This aspect have not been explored in this thesis due to the absence of direct relationship between the standards of treatment under investment treaties and notion of investment which appear to simply define what investment is and what its

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<sup>804</sup> See Chpter II at 2.3

not. Therefore, this aspect is left for another research (possibly at a post-doctorate level). The second area for further research is regarding the cost allocation of justified violations of investor's legitimate expectations. In other words, the thesis does not attempt to provide an answer as to who should bear the cost of change of laws or policies. Thirdly, discussion regarding the appropriate compensation in the event of violation of investor's legitimate expectations is also outside the purview of this research. Thus, such analysis is left for further research. Lastly, another area not covered by this thesis and clearly left for further research is the determination of legitimate expectations and balancing that exist in other areas of International law not covered by this thesis. Such areas include the jurisprudence of the International Tribunal for the Law of the Sea (ITLOS) and the International Criminal Court (ICC). Both the ITLOS and ICC jurisprudence have not been analysed due to the word limitation of the thesis and also time and space constraints. Indeed, their existence is acknowledged and can be examined at a further level of research or by future researchers in the area.

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